Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MAUREEN FASANO,

Petitioner,

—v.—

FEDERAL RESERVE BANK OF NEW YORK, RON HENRY, CYNTHIA RAMOS, LEROY HOPE, DOTTIE BOYD, KIM RUSSO, LISA YOUNG and MERTHA JAKUBISZEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Reserve Act, 12 U.S.C. § 341 (Fifth), which says that Bank employees may be dismissed "at pleasure," preempts any state employment law, in its entirety, if it does not "exactly match" the remedies and protections provided by federal employment law.

PARTIES TO THE PROCEEDING

The parties to the proceeding are set forth in the caption on the cover of this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Third Circuit dated and entered on August 3, 2006.

OPINIONS BELOW

The "precedential" opinion of the United States Court of Appeals for the Third Circuit, which dismissed plaintiff's complaint as being preempted by the Federal Reserve Act, is published at 457 F.3d 274 (3d Cir. 2006). The decision is reprinted in full in the Appendix hereto at 1a-29a. The opinion and order of the United States District Court for the District of New Jersey granting certification of the question for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is unpublished, and is reprinted in the Appendix at 30a-42a. The opinion and order of the District Court denying the defendants' motion to dismiss is unpublished, and is reprinted in the Appendix at 43a-83a.

JURISDICTION

The final decision of the Third Circuit reversing the District Court and dismissing plaintiff's complaint was entered on August 3, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution states in pertinent part:

> This Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be

> the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

U.S. Const., art. VI, cl. 2.

The Federal Reserve Act, in pertinent part, states that a Federal Reserve Bank shall have the power:

> To appoint by its board of directors a president, vice presidents, and such officers and employees as are not otherwise provided for in this Act, to define their duties, require bonds for them and fix the penalty thereof, and to dismiss at pleasure such officers or employees.

12 U.S.C. § 341 (Fifth).

The Americans with Disabilities Act, in pertinent part, states:

> Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter.

42 U.S.C. § 12201(b).

STATEMENT OF THE CASE

A. Introduction

This case presents an important, recurring conflict over the preemptive effect of the "dismiss at pleasure" language found in the federal Bank Acts, that is, the Federal Reserve

Act, 12 U.S.C. §§ 221-522; the National Bank Act, 12 U.S.C. §§ 21-216; and the Federal Home Loan Bank Act, 12 U.S.C. §§ 1421-1449. Each of these statutes contains nearly identical language, giving the federal Banks the power to "dismiss at pleasure" officers and/or employees of the Banks. See Federal Reserve Act, 12 U.S.C. § 341 (Fifth); National Bank Act, 12 U.S.C. § 24 (Fifth); Federal Home Loan Bank Act, 12 U.S.C. § 1432(a). For several years, the lower courts have struggled to determine whether this language preempts state employment statutes that protect employees from discrimination and retaliation. As one commentator observed in 1999:

> Currently, there is a split among the federal circuits and the state courts concerning whether state employment laws are preempted by the Bank Acts. The split extends to the different courts of appeal districts such that there is no consensus within those courts.

Kahn & McCarthy, At-Will Employment in the Banking Industry: Ripe for a Change, 17 Hofstra Lab. & Emp. L. J. 195, 211-212 (1999) (footnotes omitted).

In the years since that observation was made, the split among the federal circuits and other lower courts has only widened. The Sixth, Fourth, Ninth and Third Circuits have now developed at least three divergent approaches to whether the "dismiss at pleasure" language preempts state employment laws, leaving the jurisprudence in this area in considerable disarray.

The Sixth Circuit has ruled that ***all*** state employment laws are preempted by the "dismiss at pleasure" language found in the federal Bank Acts. Ana Leon T. v. Federal Reserve Bank of Chicago, 823 F.2d 928, 931 (6th Cir. 1987); Arrow v. Federal Reserve Bank of St. Louis, 358 F.3d 392, 393

(6th Cir. 2004); Wiskotoni v. Michigan Nat'l Bank-West, 716 F.2d 378, 387 (6th Cir. 1983). The Fourth Circuit appears to have reached a similar holding. Andrews v. Federal Home Loan Bank of Atlanta, 998 F.2d 214, 220 (4th Cir. 1993). Under this line of precedent, the varied employment laws of all fifty states would be completely invalid as applied to the thousands of employees working for any of the federally chartered banks.

At the other end of the divide, the Ninth Circuit has held that the "dismiss at pleasure" language does not preempt a state employment law that prohibits the same type of employment practice that is already prohibited by federal employment law. Thus, in Kroske v. US Bank Corp., 432 F.3d 976 (9th Cir. 2005), as amended 2006 U.S. App. LEXIS 3367 (Feb. 13, 2006), an age discrimination case, the Ninth Circuit held that the Washington Law Against Discrimination ("WLAD"), Wash. Rev. Code §§ 49.60.010-.400, was not preempted by the "dismiss at pleasure" language found in the National Bank Act, 12 U.S.C. § 24 (Fifth). Expressly rejecting the holding of the Sixth Circuit that state anti-discrimination laws are "preempted by the banking laws," the Ninth Circuit held that the WLAD was not preempted because it was "modeled after and incorporated into the federal anti-discrimination laws." Kroske, 432 F.3d at 985. See also id. at 981 (the presumption is against preemption because the "WLAD was enacted pursuant to the State's historic police powers to prohibit discrimination on specified grounds"). The Ninth Circuit reasoned that the "dismiss at pleasure" language could not be read to foreclose an age discrimination claim under the federal Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. From this, the Ninth Circuit concluded, "[i]t follows that the provision of the WLAD prohibiting age discrimination does not conflict with the at-pleasure provision of the National Bank Act." Id. at 987. The Ninth

Circuit reached this conclusion even though the WLAD differs from the ADEA in several respects. See infra at 15-16.

Now, the Third Circuit below has articulated a third approach, albeit one that in practical effect will invalidate almost all state employment laws as applied to Bank employees. See infra at 20-22. The Third Circuit concluded that the "dismiss at pleasure" language "preempts *any* state employment law that goes beyond the remedies and protections provided by these federal laws." 24a (emphasis in original). As a result, both the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. and the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq. were invalidated. In contrast to the Ninth Circuit, the Third Circuit reached this result, even though the New Jersey statutes prohibited conduct that is already prohibited under federal law (namely, disability discrimination and retaliation for complaints regarding illegal conduct). See also Lawrence v. National Westminster Bank, 98 F.3d 61, 70 (3d Cir. 1996) ("the ADA and [New Jersey] LAD claims are governed by the same standards"). The Third Circuit reasoned that to survive preemption, the state law must "exactly match" its federal counterpart. 11a-12a; 22a; 28a.

Moreover, the Third Circuit held that if there is ***any*** difference between state and federal employment laws, then the state law is preempted ***in its entirety***. 28a-29a. But see 42 U.S.C. § 12201(b) (preserving state laws that provide "greater for equal protection" for disabled employees than provided by federal law). Pointing to potential differences between the applicable federal and state employment statutes, the Third Circuit invalidated New Jersey's enactments as applied to Bank employees. 26a-29a.

"Volumes have been written in recent years on the complex and ever-changing issue of the pre-emptive effect of various federal statutes on employment law claims."

Zech, Federal Preemption and State Exclusive Remedy Issues in Employment Litigation, 72 N. Dak. L. Rev. 325, 325 (1996). Indeed, this Court has repeatedly granted certiorari to address whether a particular federal statutory scheme preempts a state employment law. See, e.g., English v. General Electric Co., 496 U.S. 72, 78 (1990); California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987). The federal circuits, however, have been unable to resolve their conflicts over the preemption issue in this case, despite repeated decisions spanning several years.

This case thus presents an important opportunity to resolve the conflicts among the federal circuits, to establish clear standards for assessing the preemptive effect of the Banking Acts' "dismiss at pleasure" language, and to preserve the states' historic police powers to prohibit discrimination in employment.

B. Factual Background And Trial Proceedings

Petitioner Maureen Fasano filed this action in New Jersey state court on December 18, 2002. On February 14, 2003, defendants removed the action to the United States District Court for the District of New Jersey. The trial court's jurisdiction was invoked pursuant to 12 U.S.C. § 632. 8a.

Petitioner worked for the Federal Reserve Bank of New York from October 8, 2000 to July 31, 2002, performing manual labor involving the handling and washing of currency, at the Bank's operations in East Rutherford, New Jersey. JA-58.[1]

Petitioner's complaint raised two sets of claims under state law. First, she alleged that she had formally

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[1] Citations to JA-___ are references to the Joint Appendix submitted by the parties in the Third Circuit.

complained to Bank officials that her supervisors had violated overtime laws by refusing to pay her overtime, and by improperly altering her time records. Petitioner alleged that she was retaliated against for making these complaints by being given less desirable, more physically demanding work assignments. JA-59 through JA-60.

Second, petitioner alleged that she had sought an accommodation for a disability due to a prior back injury, but that the Bank had failed to accommodate her disability, ultimately resulting in a severe exacerbation of her condition. Petitioner alleged that the failure to accommodate her disability ultimately forced her out on disability leave, from which she was never able to return to work. JA-60 through JA-61.

Based on these allegations, petitioner asserted claims for retaliation and failure to accommodate her disability under the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq. ("CEPA"), and the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. ("LAD"). The CEPA generally prohibits retaliation against employees for complaining about illegal activity, and the LAD requires accommodation for employees with disabilities.[2]

Upon removal of the case to federal court, the Federal Reserve Bank of New York ("the New York Fed") filed a motion to dismiss, asserting that plaintiff's claims were preempted by the "dismiss at pleasure" language found in the Federal Reserve Act, 12 U.S.C. § 341 (Fifth). On March 31, 2004, the District Court issued an opinion denying defendants' motion. See 43a-83a. Applying the traditional three-part preemption analysis described by this Court in

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[2] Similarly, federal law bars disability discrimination in employment, 42 U.S.C. § 12101 et seq., and specifically prohibits retaliation against Bank employees who complain about illegal conduct, 12 U.S.C. § 1831j.

English v. General Electric Co., 496 U.S. 72, 78-79 (1990), the District Court found that plaintiff's claims were not preempted by federal law. While noting the wide split in authority among courts around the country, the District Court followed the "numerous courts [that] have found that the language of the FRA *does not* prevent Federal Reserve Bank employees from bringing state law employment claims against the Bank." 60a (emphasis in original).

C. Proceedings Under The Interlocutory Appeals Act, 28 U.S.C. § 1292(b)

The New York Fed moved for reconsideration or, in the alternative, for certification pursuant to 28 U.S.C. § 1292(b). In support of its motion for certification, the New York Fed argued that the case "raise[d] Constitutional issues that will have far-ranging implications and consequences for the entire Federal Reserve System." Brief in Support of Defendants' Motion for Interlocutory Appeal, at 1 (May 21, 2004). The New York Fed also urged certification for interlocutory appeal because "[t]here can be no doubt that substantial differences of opinion have emerged on the question of whether Federal Reserve Banks are. . . presumed to be immune from state employment laws." Id. at 15. The New York Fed argued that a ruling in the case "may have an impact on other cases nationwide asserting state law employment discrimination claims against Federal Reserve Banks . . . ." Id. at 14. To emphasize this point, the New York Fed submitted Affirmations in support of interlocutory appeal from the Vice President and General Counsel for both the Federal Reserve Bank of Philadelphia and the Federal Reserve Bank of Cleveland, who argued that the broad importance of the case warranted interlocutory review. JA-79 through JA-84.

On August 9, 2005, the District Court denied reconsideration, but granted certification pursuant to 28

U.S.C. § 1292(b). Based on the "split in authority" regarding "the degree to which the FRA preempts state anti-discrimination laws," 39a, 41a, the District Court found that a "substantial ground for difference of opinion" existed, warranting interlocutory review under 28 U.S.C. § 1292(b).

The New York Fed then sought leave to appeal from the Third Circuit, repeating its contention that "interlocutory appellate review will have far-ranging implications and consequences for the entire Federal Reserve System." Defendants' Petition for Interlocutory Appeal, at 18 (Aug. 23, 2005). On September 23, 2005, the Third Circuit granted permission to appeal. 8a.

Because of the broad, national importance of the preemption issue, the Federal Reserve Banks of Atlanta, Boston, Chicago, Cleveland, Dallas, Kansas City, Minneapolis, Philadelphia, Richmond, San Francisco and St. Louis all sought and were granted leave to appear as Amici Curiae in the Third Circuit. 8a.

Central to the grant of interlocutory review was the contention, repeatedly advanced by the New York Fed, that the federal courts were in conflict over whether the Federal Reserve Act preempted state employment laws. As they argued in their main Brief to the Third Circuit:

> The "dismiss at pleasure" provisions contained in the FRA, the National Bank Act and the Federal Home Loan Bank Act have been the subject of much judicial analysis. Many courts have considered the extent to which these provisions preempt the application of state employment law.
>
> There is a split among the Circuits, and between district courts within the Third Circuit, over the

> preemptive scope of these "dismiss at pleasure" provisions.

Brief for Appellants, at 33 (Jan. 20, 2006).

D. The Third Circuit's Opinion

Like the District Court, the Third Circuit purported to analyze the preemption issue under the familiar three part analysis set forth by this Court in English. The Third Circuit noted that the presumption was ***against*** preemption, because the area of law was "not traditionally exclusively federal." 9a. Because the New York Fed did not argue for express or field preemption, the Third Circuit focused on whether New Jersey's employment laws were in conflict with federal law. 9a.

To decide whether the Federal Reserve Act's "dismiss at pleasure" language preempted state law, the Third Circuit expressly noted -- as other courts have -- that it would look to case law interpreting the analogous provisions of the Federal Home Loan Bank Act, 12 U.S.C. § 1432(a), and the National Bank Act, 12 U.S.C. § 24 (Fifth). 16a.

In conducting this analysis, the Third Circuit acknowledged the conflict among the federal courts regarding whether the "dismiss at pleasure" language preempted state employment laws. See, e.g., 7a ("the District Court noted a wide split in authority among courts around the country"); 17a (the District Court "followed several other courts and concluded . . . that no preemption occurred, regardless of the additional burdens imposed by CEPA and LAD above and beyond federal law"). Indeed, in examining the conflicts among the federal courts, at times the Third Circuit's opinion appeared to call out for guidance. See 20a ("[i]n determining whether the Federal Reserve Act

preempts, either in whole or in part, New Jersey's CEPA and LAD, we wade into murky waters").

In surveying the split in authority, the Third Circuit rejected the holdings of the Sixth and Fourth Circuits, which had held that the "dismiss at pleasure" language preempted ***all*** state employment laws. See Ana Leon T. v. Federal Reserve Bank of Chicago, 823 F.2d 928, 931 (6th Cir. 1987); Arrow v. Federal Reserve Bank of St. Louis, 358 F.3d 392, 393 (6th Cir. 2004); Wiskotoni v. Michigan Nat'l Bank-West, 716 F.2d 378, 387 (6th Cir. 1983); Andrews v. Federal Home Loan Bank of Atlanta, 998 F.2d 214, 220 (4th Cir. 1993), cited in 20a-22a.

Instead, the Third Circuit purported to adopt an "approach of partial conflict preemption of state employment laws." 22a. According to the Third Circuit, this meant that some state employment laws would not be preempted. However, in reaching this holding, the Third Circuit added an important twist: any state law would be preempted if it was not "exactly" the same as federal law. 11a-12a; 22a. According to the Third Circuit, this meant that if the state law provides any liability or remedy that goes beyond federal law, the ***entire*** state law must be invalidated. Thus, the Third Circuit held that the Federal Reserve Act "preempts *any* state employment law that goes beyond the remedies and protections provided by . . . federal laws." 24a (emphasis in original). See also 28a (state employment laws would not be preempted only if they "exactly match" federal employment law).

To demonstrate the preemptive force of this holding, the Third Circuit examined the two New Jersey statutes at issue. The New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., prohibits discrimination on the basis of disability, and requires employers to accommodate employees with disabilities. Of course, federal law imposes the same

requirements under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. Indeed, in prior cases the Third Circuit had recognized that "the ADA and LAD are governed by the same standards." Lawrence v. National Westminster Bank, 98 F.3d 61, 70 (3d Cir. 1996).

Nonetheless, the Third Circuit held that the LAD was preempted in its entirety, because the ADA and LAD have been interpreted differently in some respects. The Third Circuit noted that the LAD has been interpreted to provide individual liability; that damages under the LAD are not capped; that an LAD plaintiff is not required to file an administrative claim; and that the LAD's definition of "disability" has been interpreted more broadly than the ADA's definition of "disability." 26a-27a.

Likewise, the Third Circuit scrutinized New Jersey's whistleblower statute to find any differences with federal law that would justify total preemption. Plaintiff's claims under New Jersey's Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq., were based on her contention that she was retaliated against for complaining to Bank officials about intentional violations of overtime laws. Similarly, federal law expressly permits a Federal Reserve Bank employee to file a civil suit for damages if she is discharged or discriminated against for providing information to the bank "regarding any possible violation of any law or regulation." 12 U.S.C. § 1831j. Obviously, plaintiff's state law claim was based on alleged retaliation that would be unlawful under federal law in any event.

Still, the Third Circuit struggled to find differences between the two laws. It insisted that CEPA allows for individual liability, and 12 U.S.C. § 1831j does not. (In fact, no New Jersey state court has expressly held that CEPA provides for individual liability, and only a few federal trial courts have considered whether individual liability is

available under 12 U.S.C. § 1831j. 26a.) The Third Circuit also noted that 12 U.S.C. § 1831j only protects complaints of suspected wrongdoing to specific entities, including Bank officials. 28a. Because petitioner in this case ***did*** complain to Bank officials. 46a, the relevance of this purported distinction was not readily apparent.

Nonetheless, because the Third Circuit purported to find some differences between state and federal law, it held that the state employment law was invalidated ***in its entirety***. The Third Circuit expressly rejected the notion that it should invalidate the New Jersey statutes only to the extent they actually varied from federal law. Instead, without a sense of irony, and without reference to this Court's jurisprudence, the Third Circuit held that deference to State law required it to invalidate the state statutes in their entirety. 28a-29a.

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL CIRCUITS AS WELL AS THE STATE COURTS ARE IN CONFLICT OVER WHETHER THE FEDERAL BANK ACTS' "DISMISS AT PLEASURE" LANGUAGE PREEMPTS STATE EMPLOYMENT LAWS

Over the past two decades, the federal and state courts have splintered over to what extent the federal Bank Acts' "dismiss at pleasure" language preempts state employment laws.[3] As noted below, there is a "wide split in authority among courts around the country." 7a. This disarray is recurrent and long-standing, and shows no sign of abating.

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[3] As the Third Circuit below noted, all of the federal circuits to interpret the "dismiss at pleasure" language in the Bank Acts have done so by looking to the analogous provisions and case law for all three statutes. 16a. Indeed, we are aware of no court that has failed to interpret the "dismiss at pleasure" language consistently among the three Bank Acts.

Indeed, with the passage of time the lower courts have become more divided, not less. Among the circuits, there are now at least three different approaches to the preemptive effect of the "dismiss at pleasure" language. State appellate courts are similarly in conflict, with each other and with the federal courts. The widespread dissonance among the federal district courts, in turn, merely reflects the doctrinal confusion found in the courts of appeal. Only this Court's authoritative voice can resolve this chaos and establish clearly whether the "dismiss at pleasure" language preempts state employment laws.

The first circuit to address this issue directly was the Sixth Circuit, in Ana Leon T. v. Federal Reserve Bank of Chicago, 823 F.2d 928, 929-30 (6th Cir. 1987). The Leon court flatly held that a Federal Reserve Bank employee's state discrimination claims were all barred by the "dismiss at pleasure" language found in the Federal Reserve Act, 12 U.S.C. § 341 (Fifth). Id. at 931 (the "dismiss at pleasure" language prohibits "any state-created employment rights"). Without question, the Leon case has been roundly criticized by several other courts. Nonetheless, in 2004, the Sixth Circuit explicitly reaffirmed this holding. Arrow v. Federal Reserve Bank of St. Louis, 358 F.3d 392, 393 (6th Cir. 2004). Not surprisingly, the Sixth Circuit has construed the "dismiss at pleasure" language in the National Bank Act, 12 U.S.C. § 24 (Fifth) to also preempt all state employment laws. Wiskotoni v. Michigan Nat'l Bank-West, 716 F.2d 378, 387 (6th Cir. 1983).[4]

[4] The Fourth Circuit has similarly held that the "dismiss at pleasure" language in the Federal Home Loan Bank Act, 12 U.S.C. § 1432(a) bars state wrongful discharge claims. Andrews v. Federal Home Loan Bank of Atlanta, 998 F.2d 214, 220 (4th Cir. 1993). While Andrews did not explicitly deal with state discrimination claims, the Third Circuit below interpreted Andrews to bar all state statutory employment claims. 21a.

By contrast, the Ninth Circuit upheld Washington's Law Against Discrimination ("WLAD"), Wash Rev. Code §§ 49.60.010-.400, against a preemption challenge, based on the "dismiss at pleasure" language found in the National Bank Act, 12 U.S.C. § 24 (Fifth). Kroske v. US Bank Corp., 432 F.3d 976 (9th Cir. 2005), as amended 2006 U.S. App. LEXIS 3367 (Feb. 13, 2006). In contrast to the Sixth Circuit, the Kroske decision emphasized that the WLAD "was enacted pursuant to the State's historic police powers to prohibit discrimination on specified grounds," and therefore began "with the presumption that Congress did not intend the National Bank Act to preempt the WLAD." Kroske, 432 F.3d at 981.

The Ninth Circuit thus interpreted the "dismiss at pleasure" language much more narrowly. It noted that "courts uniformly have concluded that a bank's power to 'dismiss at pleasure is analogous to dismiss at will, implying the absence of a contractual relationship between employer and employee.'" Kroske, 432 F.3d at 984. Explicitly rejecting the Sixth Circuit's holding, id. at 985, the Court in Kroske held that the "dismiss at pleasure" language did not preempt the WLAD. The Court reasoned that the WLAD's prohibition of age discrimination simply prohibited what was already unlawful under the Age Discrimination in Employment Act, 29 U.S.C. § 623. "Moreover, parallel state anti-discrimination laws are explicitly made part of the enforcement scheme for the federal laws." Id. at 988. This supported the conclusion that the "parallel" state law claim was not preempted. Id. at 989.

In light of the subsequent Third Circuit decision, it bears emphasizing that the WLAD is not identical to the ADEA, although both statutes prohibit age discrimination. For example, the WLAD allows for more expansive damages, including emotional distress damages. Blaney v. Int'l Ass'n of Machinists, 87 P.3d 757 (Wash. 2004); Wash. Rev. Code, §

49.60.030(2). Compare Commissioner v. Schleier, 515 U.S. 323, 326 (1995). Similarly, while exhaustion of administrative remedies is required under the ADEA, it is not required under the WLAD. Wash. Rev. Code § 49.60.030(2). And while the ADEA only applies to employers with 20 or more employees, the WLAD contains no such limitation. Wash. Rev. Code § 49.60.040(3); Bennett v. Hardy, 784 P.2d 1258 (Wash. 1990). Despite these various differences, the Ninth Circuit held that the WLAD was not preempted, because it was "modeled after and incorporated into the federal anti-discrimination laws." Id. at 985.

The Third Circuit below departed from the holdings of both the Sixth and the Ninth Circuits. The Third Circuit expressly rejected the Sixth Circuit's position, 20a-23a, and held there was no principled reason to preempt state laws that "exactly" followed federal employment laws. 11a-12a.

However, the Third Circuit parted ways with the Ninth Circuit as well. Unlike the Ninth Circuit, the Third Circuit expressly rejected any interpretation of the "dismiss at pleasure" language as limited to contractual claims. 23a. Instead, reading it as giving the Bank the "unlimited" right to fire employees, even if contrary to state anti-discrimination laws, the Third Circuit held that only state laws that "exactly match" federal employment laws can survive preemption. 28a. Both the New Jersey LAD and the ADA prohibit disability discrimination, and both the New Jersey CEPA and 12 U.S.C. 1831j prohibit retaliation for complaints about suspected illegal conduct. Nonetheless, the Third Circuit held that both state statutes were preempted, because of variances between the state and federal laws. Significantly, to show why state and federal law did not "exactly match," the Third Circuit pointed out that the federal statutes had less expansive damages; required the exhaustion of administrative remedies; and had a more narrow statutory scope. 26a-28a. But, as noted, all of

these differences likewise exist between the ADEA and the WLAD. Yet, unlike the Third Circuit, the Ninth Circuit upheld the WLAD against a preemption challenge.

The Third Circuit differed from the Ninth Circuit in another important way as well. The Ninth Circuit repeatedly emphasized that to the extent there were any significant variations between state and federal law, any preemption of state law should be limited to the actual inconsistency. Kroske, 432 F.2d at 987-88, 989 (citing Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 101-06 (1983)). The Third Circuit, by contrast, expressly held just the opposite -- if the state law did not "exactly match" federal employment laws, it had to be invalidated in its entirety. 28a-29a.

While the differences between the Sixth, Ninth and Third Circuits are significant, there are several other "splits" with and among other courts. For example, as the Third Circuit itself noted, there are "several other courts" that have held that the "dismiss at pleasure" language does not preempt any state employment statute, "*even if* the state laws impose additional burdens beyond federal law," as long as they have a "common purpose." 17a (emphasis in original). Two states have adopted the "no preemption" position, in conflict with the Sixth and Third Circuits. Thus, in Sargent v. Central National Bank & Trust Co., 809 P.2d 1298, 1302 (Okla. 1991), the Oklahoma Supreme Court held that the "dismiss at pleasure" language in the National Bank Act did not preempt at all a state law claim for retaliation.

Likewise, in White v. Federal Reserve Bank, 660 N.E.2d 493, 496 (Ohio Ct. App. 1995), the Ohio Court of Appeals held that the Federal Reserve Act's "dismiss at pleasure" language did not preempt a state law claim for disability discrimination. In contrast to the Third Circuit, the Ohio Court of Appeals held that the "dismiss at pleasure"

language was "nothing more than another means of expressing an' at will' employment agreement." Id.

Another state, California, has taken yet another approach, one that appears to mirror the Ninth Circuit's holding in Kroske. In Peatros v. Bank of America, 990 P.2d 539 (Cal. 2000), a fractured California Supreme Court upheld California's Fair Employment and Housing Act against a preemption challenge under the National Bank Act. Because the court was too divided to produce a majority opinion, it is difficult to determine a clear holding. However, the "lead opinion" took a position similar to Kroske, holding that a state discrimination statute was not preempted by the "dismiss at pleasure" language. Significantly, and in sharp contrast to the Third Circuit, the Peatros "lead opinion" repeatedly emphasized that to the extent state and federal laws were in conflict, the state law would be preempted only to the limited extent that it actually conflicted with federal law. Peatros, 990 P.2d at 552 & n.6.[5]

Not surprisingly, federal district courts reflect and add to the confusion over the preemptive effect of the "dismiss at pleasure" language. Several courts, in various contexts, have held broadly that the "dismiss at pleasure" language does not preempt state discrimination and retaliation claims. This includes courts in the Second, Seventh and Fourth

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[5] Justice Brown, in her dissent, candidly noted the conflicts that had emerged over the interpretation of the "dismiss at pleasure" language:

> Both state and federal courts have variously concluded the "at pleasure" dismissal provision . . . fully preempts wrongful termination causes of action under state antidiscrimination statutes, partially preempts such claims, or has no preemptive impact whatsoever. The absence of clear consensus in this decisional authority reflects the lack of guidance from the United States Supreme Court or, more properly, the Congress.

Peatros, 990 P.2d at 559 (Brown, J., dissent).

Circuits. See, e.g., Moodie v. Federal Reserve Bank, 831 F. Supp. 333, 336-37 (S.D.N.Y.) (the Federal Reserve Act did not bar a race discrimination claim based on New York state law), reconsideration denied, 835 F. Supp. 751 (S.D.N.Y. 1993), later proceeding, 862 F. Supp. 59 (S.D.N.Y. 1994), aff'd, 58 F.3d 879 (2d Cir. 1995); James v. Federal Reserve Bank, 2005 U.S. Dist. LEXIS 43493, at *15-*16, *19-*21 (E.D.N.Y. Aug. 9, 2005) (state law discrimination claim was not preempted, and plaintiff could take advantage of longer statute of limitations); Booth v. Old National Bank, 900 F. Supp. 836, 843 (N.D. W. Va. 1995) ("dismiss at pleasure" language did not bar state retaliatory discharge claim); Katsiavelos v. Federal Reserve Bank, 1994 U.S. Dist. LEXIS 18501, at *10-*11 (N.D. Ill. Dec. 28, 1994) (Federal Reserve Bank is subject to the Illinois Human Rights Act), reconsideration denied, 1995 U.S. Dist. LEXIS 2603 (N.D. Ill. Mar. 3, 1995).

By contrast, several other courts -- mostly in the Sixth or Third Circuits -- hold that the "dismiss at pleasure" language bars state employment claims. See, e.g., Evans v. Federal Reserve Bank, 2004 U.S. Dist. LEXIS 13265 (E.D. Pa. July 8, 2004); Sheehan v. Anderson, 2000 U.S. Dist. LEXIS 3048 (E.D. Pa. Mar. 17, 2000), aff'd, 263 F.3d 159 (3d Cir. 2001); Kispert v. Federal Home Loan Bank of Cincinnati, 778 F. Supp. 950, 952-53 (S.D. Ohio 1991).

The experience of the past several years demonstrates that the conflicts among the lower courts are long-standing, recurring, and active. They involve conflicts among the circuit courts; conflicts between the circuits and the state courts; and countless conflicts among the federal district courts. Only this Court's authoritative voice can bring order to the jurisprudence in this area.

II. THE CONFLICT OVER THE PREEMPTIVE EFFECT OF THE "DISMISS AT PLEASURE" LANGUAGE HAS NATIONAL SIGNIFICANCE FOR THOUSANDS OF BANK EMPLOYEES, AND FOR DOZENS OF STATE STATUTES

The conflict over the preemptive effect of the "dismiss at pleasure" language concerns more than the immediate parties. Indeed, as the New York Fed repeatedly emphasized in the Third Circuit, it sought an interlocutory ruling precisely so it would have "nationwide" impact. By involving as Amici Curiae the other eleven Federal Reserve Banks, we may fairly assume they will attempt to use to Third Circuit's ruling to curtail the employment rights of thousands of Bank employees throughout the country. See infra at 8-9.

Nor is this conflict limited to employees of the Federal Reserve Banks. As noted, every circuit to address this issue has interpreted the "dismiss at pleasure" language consistently among the Federal Reserve Act, the National Bank Act and the Federal Home Loan Bank Act. 16a-17a. Therefore, while the conflict over the "dismiss at pleasure" language is presented in this case in the context of the Federal Reserve Act, in practical effect the resolution of that conflict -- or its persistence -- will affect employees and/or officers at all of the federally chartered Banks.

If followed in other jurisdictions, the Third Circuit's ruling will preempt several other state employment laws. For example, all fifty states have some form of whistleblower law, and the types of protections afforded by those statutes vary considerably. See http://www.ncsl.org/programs/employ/whistleblower.htm. A cursory review reveals that several states have protections that vary from the provisions of 12 U.S.C. § 1831j. For example, New York protects a broader range of complaints, both in terms of the

substance of the complaint, and the person to whom the complaint is made. N.Y. Lab. Law §§ 740-741. See also Me. Rev. Stat. Ann. tit. 26, § 831 et seq.; N.H. Rev. Stat. Ann. § 275-E et seq. Other states afford remedies not specified by 12 U.S.C. § 1831j, such as punitive damages. See Haw. Rev. Stat. § 378-61 et seq.; Mich. Comp. Laws Ann. § 15.361 et seq.; Minn. Stat. Ann. § 181.931 et seq. Under the Third Circuit's holding, any of these -- and countless other -- variations would render the ***entire*** state law void as applied to Bank employees.

The sweeping preemptive force of the Third Circuit's ruling would likewise preempt state efforts to prohibit disability discrimination. This is ironic, because as this Court has noted, states took the lead in attacking disability discrimination before the ADA was enacted:

> [B]y the time that Congress enacted the ADA in 1990, every State in the Union had enacted such measures. At least one Member of Congress remarked that "this is probably one of the few times where the States are so far out in front of the Federal Government, it's not funny."

Board of Trustees v. Garrett, 531 U.S. 356, 368 n.5 (2001).

Once again, however, these state efforts to exercise their historic police powers would be preempted under the Third Circuit ruling, because very often the States have provided protections that exceed the provisions of the ADA. For example, several states define "disability" in ways that are broader than the ADA's definition. See, e.g., Cal. Gov't Code, § 12926; R.I. Gen. Laws § 42-87-1; Conn. Gen. Stat. § 46a-51(15); N.Y. Exec. Law § 292(21); Wash. Rev. Code § 49.60.180; Pulcino v. Fed. Express Corp., 9 P.3d 787, 791 & n. 3 (Wash. 2000); Hoover v. Norwest Private Mortg. Banking, 632 N.W.2d 534, 543 & n.5 (Minn. 2001); Dahill v. Police

Dep't of Boston, 748 N.E.2d 956, 962-64 (Mass. 2001). Under the Third Circuit's holding, because these state employment laws provide greater protections for disabled employees than the ADA, they would all be preempted *in their entirety*.

This outcome would certainly be ironic, given that the ADA itself purports to ***preserve*** state laws that provide greater protections for disabled employees.

> Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter.

42 U.S.C. § 12201(b).

The impact of such sweeping preemption is especially important, because the ADA incorporates Title VII's requirement that the EEOC work cooperatively with state agencies enforcing analogous state discrimination laws. 42 U.S.C. § 12117(a) (providing that the ADA will use the procedures set forth in, inter alia, 42 U.S.C. §§ 2000e-5 and 2000e-8). Under Title VII (and thus under the ADA), the EEOC is required to defer to state agencies enforcing their own discrimination statutes. 42 U.S.C. § 2000e-5(c) and (d). Thus, one impact of the Third Circuit's ruling would be to interfere with the collaborative enforcement scheme contemplated by federal law. Compare Kroske, 432 F.3d at 988-89 (the "nature of the collaborative anti-discrimination scheme" supports the conclusion that the WLAD is not preempted by the "dismiss at pleasure" language). In fact, in the Third Circuit the Amici Curiae urged that state agencies should be divested of jurisdiction over employment discrimination claims. See 12a.

The conflict over the preemptive effect of the "dismiss at pleasure" language, therefore, impacts the rights of thousands of Bank employees; challenges the validity of countless state employment laws; and impairs the collaborative state/federal enforcement scheme envisioned by federal discrimination statutes. As the New York Fed itself argued below, this conflict raises Constitutional issues that can have "far-ranging implications and consequences for the entire Federal Reserve System." See supra at 8. Given the importance of the conflict, certiorari should be granted.

III. THE THIRD CIRCUIT'S HOLDING CANNOT BE RECONCILED WITH THIS COURT'S PREEMPTION JURISPRUDENCE

Finally, this Court should grant certiorari because the holding below is in significant tension with this Court's preemption jurisprudence. In at least three critical respects, the Third Circuit's decision conflicts in principle with the decisions of this Court.

First, as the Ninth Circuit noted in Kroske, 432 F.3d at 981, the states' "historic police powers" clearly extend to the field of employment, including discrimination. DeCanas v. Bica, 424 U.S. 351, 356 (1976); Railway Mail Ass'n v. Corsi, 326 U.S. 88, 97 (1945). As a result, this Court must "start with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

As this Court has emphasized repeatedly, this presumption applies not only to the question of ***whether*** Congress intended any preemption at all, but also to the ***extent*** of any preemption, even when it is express.

Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996); Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005).

The Third Circuit violated this presumption, by finding a preemption of New Jersey's historic police powers in the absence of a clear and manifest expression of Congressional intent. In this case, the basis for the purported preemption of state employment laws is the Federal Reserve Act's "dismiss at pleasure" language. 12 U.S.C. § 341 (Fifth). But that provision actually says not one word about state law. As the legislative history to the Federal Reserve Act suggests, the "dismiss at pleasure" language simply derived from analogous language found in the National Bank Act, 12 U.S.C. § 24 (Fifth). See H.R. Report No. 69, 63rd Cong., 1st Sess. (1913) (the Federal Reserve Banks are to have "powers precisely analogous to those of the national banks . . . . There is no reason why any important distinction as to type of organization should be drawn or exist between the typical reserve bank and the typical national bank"). As noted by the Ninth Circuit, this "dismiss at pleasure" language "is analogous to dismiss at will, implying the absence of a contractual relationship between employer and employee." Kroske, 432 F.3d at 984. There is nothing in the language, history or purpose of the federal Bank Acts, however, to suggest that the "dismiss at pleasure" language was intended to displace the states' police powers.

Given the presumption against preemption, however, this means the "dismiss at pleasure" language should not be read to displace the states' police powers at all. In English v. General Electric Co., 496 U.S. 72 (1990), for example, this Court reviewed a decision that had invalidated a state law claim for damages arising out of employment at a nuclear facility. By statute, Congress had enacted a detailed scheme by which employees in the nuclear industry could make complaints related to nuclear safety, so the defendants argued this preempted any state law cause of action the

employee might bring. This Court -- while conceding Congress' exclusive power to regulate nuclear safety -- noted that "the mere existence of a federal regulatory or enforcement scheme . . . does not by itself imply preemption of state remedies." Id. at 87. See also id. at 85 ("[w]e have no doubt, for instance, that the application of state minimum wage and child labor laws to employees at nuclear facilities would not be preempted"). The simple fact is that a state law banning employment discrimination does not interfere with the regulation of "banking."

Normally, the presumption against preemption has meant that this Court will strive to find ways to preserve state law. See California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 290-91 (1987) (a state law requiring employers to grant an unpaid pregnancy leave did not conflict with the federal law banning discrimination on the basis of pregnancy, because employers were free to grant the same unpaid leave to other categories of employees). This should be especially true where, as here, Congress has expressly sought to preserve state laws that provide "greater or equal" protection for employees with disabilities. 42 U.S.C. § 12201(b).[6]

Second, the Third Circuit erred in holding that New Jersey's statutes were preempted simply because they provided ***remedies*** or procedures that varied from federal employment laws. Even when there is an explicit preemption of state law, this Court has repeatedly rebuffed attempts to conflate state ***requirements*** with state ***remedies***. Indeed, even when Congress has enacted a specific remedial scheme, this Court has taught "that ordinarily, state causes

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[6] The Third Circuit disregarded the ADA's "anti-preemption" provision, citing Shaw v. Delta Air Lines, 463 U.S. 85, 101 n. 22 (1983). 25a. But the Third Circuit failed to note this critical distinction: Shaw involved a federal statute that included an explicit preemption of state law. Shaw, 463 U.S. at 91. This case does not.

of action are not preempted solely because they impose liability over and above that authorized by federal law.'" English v. General Electric, 496 U.S. at 89. Thus, in English, this Court permitted an employee at a nuclear facility to pursue a state law cause of action, even though it permitted recovery in various ways that differed from federal law (including providing punitive damages, a longer statute of limitations and a broader scope of protected activity). Id. at 87-89. See also Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984) (estate of deceased nuclear employee could maintain state cause of action for damages -- including punitive damages -- for exposure to radiation, even though Congress had exclusive power to regulate nuclear safety, and even though Congress had failed to provide any cause of action).

While this Court's preemption jurisprudence has sometimes engendered disagreements within the Court, this Court has been unanimous in holding that a federal statutory scheme -- even when it explicitly preempts state law -- does not interfere with state remedies pursuant to the states' historic police powers, absent an express Congressional intent to preempt. For example, in Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996), a divided Court struggled with the preemptive effect of the Medical Device Amendments of 1976, which included an express preemption of any state requirement "different from, or in addition to" federal law. 21 U.S.C. § 360k(a). However, the Court was unanimous in holding that the plaintiff could pursue a state cause of action for violation of federal standards, even though no private cause of action was provided by federal law. See Medtronic, 518 U.S. at 487-88; id. at 513 ("I also agree that the Lohrs' claims are not preempted by § 360k to the extent that they seek damages for Medtronic's alleged violation of federal requirements") (O'Connor, J., dissent); see also Bates v. Dow Agrosciences, 544 U.S. at 447-48.

Finally, even if there were any basis to preempt state law in this case, the Third Circuit made a radical departure from this Court's jurisprudence by holding that any purported "conflict" required the state law to be preempted in its entirety. See 28a (refusing to "pare back CEPA and the LAD to exactly match the ADA and 12 U.S.C. § 1831j"). On the contrary, this Court has always held that "state law is displaced only 'to the extent that it actually conflicts with federal law.'" Dalton v. Little Rock Family Planning Services, 516 U.S. 474, 476 (1996).

For example, in English, the lower court held that the employee's state law claim was preempted, because federal law denied relief to a whistleblower who commit a safety violation. However, this Court concluded that even if Congress "wanted those who deliberately commit nuclear safety violations . . . to be denied all remedies against employer retaliation, this federal interest would be served by preempting state law ***only to the extent that it afforded recovery to such violators***." English, 496 U.S. at 88 (emphasis added). Indeed, the Third Circuit's effort to find any variation between state and federal law -- and use that as the basis to preempt the entire state law -- runs afoul of the "teaching of this Court's decisions . . . [which] enjoins seeking out conflicts between state and federal regulation where none clearly exists." Id. at 89. Even when faced with a Congressional enactment expressly preempting state law, this Court has been careful to limit preemption only to the extent there is an actual conflict, and has declined to preempt the state law in its entirety. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 108 (1983).

In sum, the Third Circuit's decision departs substantially from this Court's preemption jurisprudence. Given the conflicts among the circuits and the other lower courts, and the national significance of the preemption question in this case, this Court should exercise its certiorari jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 31, 2006

APPENDIX

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-4661

MAUREEN FASANO

—v.—

FEDERAL RESERVE BANK OF NEW YORK; RON HENRY; CYNTHIA RAMOS; LEROY HOPE; DOTTIE BOYD; KIM RUSSO; LISA YOUNG; MERTHA JAKUBISZEN,

Appellants

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 03-cv-0672)
District Judge: Honorable Jose L. Linares

Argued June 29, 2006

Before: BARRY, VAN ANTWERPEN, and JOHN R. GIBSON,* *Circuit Judges.*

(Filed: August 3, 2006)

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* Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit, sitting by designation.

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OPINION OF THE COURT

VAN ANTWERPEN, *Circuit Judge.*

Appellant Federal Reserve Bank of New York brings this interlocutory appeal of the District Court's refusal to find appellee Maureen Fasano's employment claims, based on New Jersey state law, preempted by the Federal Reserve Act, 12 U.S.C. § 341(Fifth). For the reasons set forth below, we will reverse and remand with instructions to dismiss Fasano's Complaint.

I.

A. Federal Reserve Banks

Because the nature of Federal Reserve Banks is at issue in this case, we begin by briefly describing their history and function. The Federal Reserve Bank of New York ("New York Fed") is one of twelve Federal Reserve Banks governed by the Federal Reserve Act ("FRA"), 12 U.S.C. § 221 *et seq.* The Federal Reserve Banks were established by Congress in 1913 to be the "monetary and fiscal agents of the United States." *First Agric. Nat'l Bank v. State Tax Comm'n,* 392 U.S. 339, 356 (1968) (Marshall, J., dissenting). *See also* Federal Reserve Act of 1913, Pub. L. No. 63-43, 38 Stat. 251. To aid in achieving Congress's goal of insulating them from political pressure, the Federal Reserve Banks are formed as corporations. 12 U.S.C. § 341. Within their respective designated territories, the Federal Reserve Banks supervise and maintain the nation's banking system, examine the national[1] and state banks that have purchased memberships in the Federal Reserve System, 12 U.S.C. §§ 325, 481 *et seq.*, and clear checks and deposits between depository institutions. 12 U.S.C. § 360.

The individual Federal Reserve Banks serve as the foundation for the Federal Reserve System. The presi-

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[1] Federal Reserve Banks are not "national banks." "National bank" denotes banks such as Citibank or Bank of America, organized under the National Bank Act. 12 U.S.C. § 21 *et seq.* Before the passage of the Federal Reserve Act, national banks formerly performed essential governmental monetary functions such as issuing currency. The Federal Reserve Banks have now taken over these functions, leaving little difference between national banks and state-chartered banks. We will attempt to be as precise as possible when referring to "national banks" as opposed to Federal Reserve Banks.

dents of the New York Fed and four other Federal Reserve Banks, along with the Board of Governors of the Federal Reserve System ("Board of Governors"), constitute the Federal Open Market Committee, 12 U.S.C. § 263, charged by Congress with: "maintain[ing] long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates." 12 U.S.C. § 225a. The individual Federal Reserve Banks carry out the monetary policy so formulated. The Board of Governors, comprising seven Presidential appointees, 12 U.S.C. § 241, loosely oversees the Federal Reserve Banks' operations. 12 U.S.C. § 248(j). The Board of Governors is empowered to levy assessments on the Federal Reserve Banks to pay expenses, 12 U.S.C. § 243, and issue governing regulations, *see, e.g.*, 12 U.S.C. § 248-1.

The Federal Reserve Banks are intimate parts of the Government's fiscal structure. In addition to acting as the Government's fiscal agent, the Federal Reserve Banks serve as the depository for the United States Treasury. 12 U.S.C. § 391. The United States, while not a capital stockholder in the Federal Reserve Banks, is the residual interest-holder in the unlikely event of a Federal Reserve Bank's liquidation. 12 U.S.C. § 290. Congress has on occasion treated the Federal Reserve Banks as the Government's own rainy day fund, directing, for example, the payment of $3.7 billion to the United States Treasury in 2000. 12 U.S.C. § 289; *see also* Pub. L. No. 103-66, § 3002(b), 107 Stat. 337 (1993) (directing payment of $106 Million to United States Treasury in 1997; $107 Million to United States Treasury in 1998). Collectively, the Federal Reserve Banks carry out the func-

tions of the United States' central bank—issuing and maintaining legal tender, i.e., Federal Reserve Notes; acting as repository of Government funds; and interacting with foreign countries' central banks.

While placed by law in a home city, each Federal Reserve Bank spans at least three states, and eleven are under the territorial jurisdiction of more than one United States Circuit Court of Appeals. The New York Fed has responsibility for all of New York, Puerto Rico, and the United States Virgin Islands, and parts of New Jersey and Connecticut.

B. Instant Dispute

Turning to the matter at hand, Maureen Fasano worked in the New York Fed's East Rutherford, New Jersey office from 2000-2002.[2] Fasano initially worked as a currency verification operator and junior operator, handling and washing currency. This involved, *inter alia,* lifting heavy materials one day a week. On August 15, 2001, Fasano realized that she had not been paid for overtime she had recorded on her time sheet. On bringing this to the attention of a supervisor, Fasano saw that her time sheet had been altered and was told that because no other employees had submitted overtime, she would not be paid for it. Fasano met with several supervisors to discuss her complaints, and was told that she *would* be paid for the overtime; the supervisors allegedly asked her not to speak of the incident with any other employee. Fasano claims a co-worker later told her the

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[2] For the purpose of this appeal from a motion to dismiss, we recite the facts regarding Fasano's underlying employment claims as stated in her Complaint.

supervisors would try to make Fasano quit for causing "trouble."

In September, 2001, Fasano met with the New York Fed's Human Resources Department to complain that her pay was too low for her seniority, and that she had not received a standard raise. She also met with another supervisor, who asked whether she thought she was being "prejudiced" against; Fasano responded "yes."

In late November, 2001, Fasano was transferred to a "floater" position, where she was assigned to different rooms and did heavy lifting each day. Fasano had a pre-existing neck injury that had not previously impacted her employment despite the one-day-a-week heavy lifting, and Type 1 diabetes that necessitated frequent eating. Fasano believed that her supervisors at the New York Fed knew of each condition, and (1) assigned her to the floater position in the hope that she would injure herself; and (2) prevented her from taking breaks during her shift to eat. At one point, Fasano complained to supervisors that the new position was "killing her."

On December 18, 2001, Fasano injured her back and allegedly went on long-term disability leave. According to the New York Fed, Fasano never fully applied for disability benefits, and never responded to a letter sent to her on July 2, 2002, notifying her that she must either return to work or file a completed benefits application. Fasano was thereafter terminated on July 31, 2002.

Fasano then filed this suit in the New Jersey Superior Court against the New York Fed and various employees, both in their official and individual capacities, alleging (1) retaliation, in violation of the New Jersey Conscientious Employee Protection Act ("CEPA"), N.J. Stat. Ann. § 34:19-1 *et seq.* (West 2006); (2) failure to accommodate, in violation of the New Jersey Law Against Dis-

crimination ("LAD"), N.J. Stat. Ann. § 10:5-1 *et seq.* (West 2006); and (3) retaliation, in violation of the LAD. The New York Fed removed the case to the United States District Court for the District of New Jersey on February 14, 2003, pursuant to 12 U.S.C. § 632, and filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1), for lack of subject matter jurisdiction due to preemption by the Federal Reserve Act; and Fed.R.Civ.P. 12(b)(6), for failure to state a claim upon which relief can be granted.

On March 31, 2004, the District Court denied the New York Fed's Rule 12(b)(1) motion, concluding that a Federal Reserve Bank is not a federal instrumentality but is instead treated as a private corporation, and that the Federal Reserve Act did not preempt any state employment laws, even if they imposed additional burdens and liabilities beyond federal law (as did CEPA and LAD). The District Court also denied the New York Fed's Rule 12(b)(6) motion as to all claims. Following initial discovery, the New York Fed filed counterclaims based on Fasano's failure to disclose a private business venture before, during, and after her employment.[3]

The New York Fed then filed a motion for reconsideration, which the District Court denied on August 9, 2005. However, the District Court noted a wide split in authority among courts around the country and a recent contrary holding by a district court in the Eastern District of Pennsylvania finding preemption in a nearly-identical case involving the Federal Reserve Bank of Philadelphia. The District Court thus granted certification of the question for interlocutory appeal pursuant to

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[3] These counterclaims are not part of this appeal. We reject Fasano's argument that by removing the case to the District Court and filing counterclaims, the New York Fed "conceded" that subject matter jurisdiction existed and waived its preemption arguments.

28 U.S.C. § 1292(b).[4] We granted permission to appeal on September 23, 2005. On March 14, 2006, we granted the motion of the other 11 Federal Reserve Banks to proceed as Amici Curiae.

II.

The District Court had jurisdiction pursuant to 12 U.S.C. § 632, which provides that all civil suits against Federal Reserve Banks are "deemed to arise under the laws of the United States . . . ; and any defendant in any such suit may, at any time before the trial thereof, remove such suits from a State court into the district court . . . ." We have jurisdiction over the interlocutory appeal pursuant to 28 U.S.C. § 1292(b). We exercise plenary review over issues of subject matter jurisdiction, including preemption. *Travitz v. Northeast Dep't ILGWU Health & Welfare Fund,* 13 F.3d 704, 708 (3d Cir. 1994).

III.

The New York Fed contends that by virtue of the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, cl. 2, the Federal Reserve Act preempts either wholly or in part the application of New Jersey's CEPA and LAD to a Federal Reserve Bank. In

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[4] The exact question certified by the District Court was "whether the Federal Reserve Bank is immune from state employment discrimination law claims, particularly whether the FRA preempts state anti-discrimination laws." *Dist. Ct. Op. (Aug. 9,* 2005) at *12. The New York Fed did not request reconsideration or certification of the denial of its Fed.R.Civ.P. 12(b)(6) motion to dismiss, and consequently we will not consider the substantive merits of Fasano's claims.

the interest of clarity, we will begin with a brief summary of the possible forms of preemption, and then address that alleged by the New York Fed.

In normal preemption cases, we apply the familiar analysis set forth by the Supreme Court in *English v. General Electric Co.*, 496 U.S. 72 (1990). *See, e.g., Barber v. UNUM Life Ins. Co. of Am.*, 383 F.3d 134 (3d Cir. 2004). We recognize three forms of preempti n— express, field, and conflict. "First, Congress can define explicitly the extent to which its enactments pre-empt state law." *English*, 496 U.S. at 78. "Second, in the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *Id.* at 79.

> "Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Id. (citations and quotation marks omitted). The presumption remains *against* conflict preemption under *English* where, as here, the area of law is not traditionally exclusively federal. *C.E.R. 1988, Inc. v. Aetna Cas. & Sur. Co.*, 386 F.3d 263, 268 (3d Cir. 2004).

On appeal, the New York Fed alleges conflict preemption instead of field and express preemption. We note, however, that because the distinction between field and conflict preemption is often blurry, cases and concepts addressing one may be helpful regarding the other. *See, e.g., NE Hub Partners, L.P. v. CNG Transmission*

Corp., 239 F.3d 333, 348 (3d Cir. 2001); *see also English*, 496 U.S. at 79 n.5.

The New York Fed's argument is two-fold: First, it argues that *English* is inapplicable because of the Federal Reserve Banks' alleged status as protected federal instrumentalities. Under this rationale, preemption is presumed, absent explicit authorization of suit or application of state law by Congress. "Where Congress does not affirmatively declare its *instrumentalities or property* subject to regulation, the federal function must be left free of regulation." *Hancock v. Train*, 426 U.S. 167, 179 (1976),[5] *substantive holding superseded by statute* Pub. L. No. 95-96, § 116, 91 Stat. 711 (1977), (emphasis added) (citation and quotation marks omitted). Second, the New York Fed argues that even if we apply normal *English* conflict preemption, CEPA and LAD impermissibly conflict with 12 U.S.C. § 341 of the Federal Reserve Act, which grants the Federal Reserve Banks the power to dismiss "at pleasure" any employee, at least to the extent that CEPA and LAD impose burdens going

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[5] Fasano reads *Hancock* and a later Supreme Court case, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), as setting down a preemption rule solely for federally-owned *facilities*. While it is certainly true that both of these cases explicitly addressed federal facilities, Fasano ignores the Supreme Court's language extending the rule equally to both "instrumentalities or property," *Hancock*, 426 U.S. at 179. *See also Goodyear*, 496 U.S. at 188 n.1 (White, J., dissenting) (noting that "[t]he Court recognizes, and I agree, that under our precedents the [federallyowned] facility here . . . must be treated as a federal instrumentality for the purpose of applying the Supremacy Clause"). The District Court correctly noted the consequential equivalence of federal facilities and instrumentalities with regard to entitlement to presumptive preemption. *Dist. Ct. Op. (Mar. 31, 2004)* at *6. We refer to *Hancock* and *Goodyear* not to establish that the New York Fed is a federal instrumentality, but to explain the *consequences* of such instrumentality status.

beyond those already imposed by *federal* anti-discrimination laws.

For the reasons we will now discuss, we conclude that under either of these approaches—searching for Congressional authorization for suit versus intent to preempt—Fasano's Complaint must be dismissed as preempted by the Federal Reserve Act.

IV.

While not dispositive here, we first address the New York Fed's allegation that Federal Reserve Banks are federal instrumentalities, entitled to presumptive preemption of state law claims. Fasano urges us to uphold the District Court's conclusion that the Federal Reserve Banks are instead mere private corporations. Equating "instrumentality" with "federal agency," the District Court placed near-dispositive reliance on a Guidance issued by the Equal Employment Opportunity Commission ("EEOC") in 1993 regarding the proper procedures for filing federal discrimination charges against Federal Reserve Banks, but which required classifying Federal Reserve Banks as either "federal agencies" or "private employers." While it acknowledged that Federal Reserve Banks have been characterized as federal instrumentalities, the District Court limited such cases to taxation. We ultimately need not determine, for the purposes of this case, whether Federal Reserve Banks are federal instrumentalities in the employment law field. Even were we to find such instrumentality status, suits would be permitted up to the level authorized by Congress. As we explain below, Congress has authorized suits based on *federal* anti-discrimination laws, and we see no principled distinction between such suits and suits based on

state antidiscrimination laws that are *exactly* analogous to those federal laws. CEPA and the LAD, however, are far from coincident with the ADA and federal whistleblower statutes. Thus, suit based on CEPA and the LAD would lie outside any authorization of Congress.

Because this is the same conclusion we reach using the standard *English* preemption analysis, we decline to formally reach here whether Federal Reserve Banks should be considered federal instrumentalities. We note, however, that strong arguments have been made in favor of such status.[6]

Instrumentality jurisprudence has never been characterized by particular clarity. However, the District Court's decision rested, in several respects, on infirm ground. First, the EEOC Guidance is of questionable relevance. The EEOC's 1993 *Enforcement Guidance on Coverage of Federal Reserve Banks* (No. N-915-002) addressed whether Federal Reserve Banks were "private employers covered by the private sector provisions" of

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[6] Indeed, several Circuits have found the Federal Reserve Banks to be federal instrumentalities, albeit in the context of immunity from taxation. *See, e.g., Scott v. Fed. Reserve Bank of Kansas City*, 406 F.3d 532 (8th Cir. 2005) (reaffirming *Fed. Reserve Bank of St. Louis v. Metrocentre Improvement Dist. #1*, 657 F.2d 183 (8th Cir. 1981), a taxation case, in the context of the general application of the Federal Rules of Appellate Procedure); *Fahey v. O'Melveny & Myers*, 200 F.2d 420 (9th Cir. 1983); *Fed. Reserve Bank v. Comm'r of Corps. & Taxation*, 520 F.2d 221 (1st Cir. 1975) (reaffirming that Federal Reserve Banks are federal instrumentalities, as held in *Fed. Reserve Bank of Boston v. Comm'r of Corps. & Taxation*, 499 F.2d 60 (1st Cir. 1974)). We note, however, the decisions of the Massachusetts, New York, Wisconsin, Washington, and Des Moines Human Rights or Equal Rights commissions, all disclaiming *employment* discrimination jurisdiction over Federal Reserve Banks because of their status as federal instrumentalities. *See Br. of Amici Curiae Federal Reserve Banks* at 14-16.

Title VII, or instead "executive agencies covered under the federal sector provisions." Purely for the purpose of clarifying which procedures govern the filing and disposition of complaints, the EEOC concluded that the Federal Reserve Banks were "private employers." However, the EEOC in that matter was presented with only two choices—"executive agency" or "private employer." Contrary to Fasano's assertions on appeal, we have more than two available choices in our lexical pantheon. The New York Fed does not claim to be *part* of the United States Government, but instead an instrumentality thereof. We thus discern little persuasive value in the EEOC's determination simply that Federal Reserve Banks are not "executive agencies" within the specific meaning of federal statutes.[7] Whether or not an entity is a federal instrumentality for Supremacy Clause analysis is a different question from whether an instrumentality is a federal agency for a specific statute.

We also take issue with the contention that federal instrumentalities do not exist beyond the field of taxation. *See, e.g., United States Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736 (2004) (Postal Service is a federal instrumentality for antitrust purposes); *Federal Land Bank v. Priddy*, 295 U.S. 229 (1935) (federal land banks held at the time to be federal instrumentalities for attachment of property purposes). Moreover, while we acknowledge that the Supreme Court has been less than crystal clear in elucidating a test for federal instrumentalities, the mere fact that the Federal Reserve

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[7] For similar reasons, we reject reliance on *Lewis v. United States*, 680 F.2d 1239 (9th Cir. 1982), wherein the Ninth Circuit held Federal Reserve Banks not to be covered under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.*, as that statute defines "federal agency" and "federal instrumentality" especially narrowly.

Banks are organized in the corporate form does not itself prevent them from being federal instrumentalities. As the New York Fed correctly notes, the Bank of the United States in the bedrock case of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), was found to be a federal instrumentality despite its corporate status.

Furthermore, Federal Reserve Banks indeed possess many of the hallmarks of federal instrumentalities. *Emergency Fleet Corp. v. Western Union Tel. Co.*, 275 U.S. 415, 425-26 (1928) ("Instrumentalities like the national banks or the federal reserve banks, in which there are private interests, are not departments of the Government. They are private corporations in which the Government has an interest."). For example, Federal Reserve Banks are surely "virtually . . . an arm of the Government." *Dep't of Employment v. United States*, 385 U.S. 355, 359-60 (1966) (finding the Red Cross to be a federal instrumentality). Like the Red Cross, Federal Reserve Banks are not profit-seeking enterprises. Ultimately, the Federal Reserve Banks are "not private business. The policy of the Federal Reserve Banks is governed by the policy of the United States with regard to them." *Am. Bank & Trust Co. v. Fed. Reserve Bank of Atlanta*, 256 U.S. 350, 359 (1921). Thus, we question the District Court's ultimate conclusion that Federal Reserve Banks are, by their nature, wholly private corporations.

As we have indicated, however, we are not required to reach the broader, albeit amply supportable, conclusion that the New York Fed is a federal instrumentality. As we discuss below, Fasano's Complaint must be dismissed as preempted by the Federal Reserve Act where the state grounds for the suit—CEPA and the LAD—impermissibly frustrate Congress's intent to provide the

Federal Reserve Banks with the widest latitude possible in personnel decisions.

V.

It is the New York Fed's second argument—that suit alleging violations of New Jersey's CEPA and LAD conflicts with the Federal Reserve Act and is therefore preempted—that we find dispositive. Both statutes indisputably impose substantive and procedural burdens well beyond those imposed by federal law, and thereby frustrate Congressional intent to provide the Federal Reserve Banks with relatively unfettered employment discretion. We will reverse on this ground, and remand for the dismissal of Fasano's Complaint.

In Part A to follow, we lay out the boundaries of the main preemptive language contained in the Federal Reserve Act, as implicitly amended by the ADA and the federal banking whistleblower statute, 12 U.S.C. § 1831j. In Part B, we adopt the holding of courts which have found conflict preemption where a state employment law grants greater substantive, procedural, or remedial protections than those already permitted by the ADA and 12 U.S.C. § 1831j. In Part C, we conclude that New Jersey's CEPA and LAD both go far beyond what is permitted by the Federal Reserve Act, and are therefore preempted as applied to the New York Fed.

A. Federal Reserve Act § 341(Fifth)

We "start[ ] with the basic assumption that Congress did not intend to displace state law." *C.E.R. 1988, Inc.*, 386 F.3d at 268 (quoting *Bldg. & Const. Trades Council of Metro. Dist. v. Assoc. Builders & Contractors of*

Mass./R.I., Inc., 507 U.S. 218, 224 (1993)). Conflict preemption arises in the absence of specific preemption language, where an individual is unable to follow both federal and state laws simultaneously, or where the state law "would frustrate the federal scheme." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985); *see also English*, 496 U.S. at 79 ("where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). We recently explained that "federal and state law need not be contradictory on their faces for preemption to apply. It is sufficient that the state law 'impose[s] . . . additional conditions' not contemplated by Congress." *Surrick v. Killion*, 449 F.3d 520, 2006 U.S. App. LEXIS 13618, at *31 (3d Cir. June 2, 2006) (quoting *Sperry v. Florida*, 373 U.S. 379, 385 (1963)) (alteration in original).

"Pre-emption fundamentally is a question of congressional intent." *English*, 496 U.S. at 78-79. Therefore, "the first step in determining whether . . . claims are preempted is to evaluate the statute and regulations for evidence of congressional intent." *C.E.R. 1988, Inc.*, 386 F.3d at 270.

The key preemptive language in the Federal Reserve Act is contained in 12 U.S.C. § 341(Fifth),[8] which states that a Federal Reserve Bank shall have the power:

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[8] Consistent with past practice, we note that for the purpose of analyzing § 341(Fifth), we may look to analogous provisions of the Federal Home Loan Bank Act, 12 U.S.C. § 1432(a) ("and to dismiss at pleasure such officers, employees, attorneys, and agents"), the National Bank Act, 12 U.S.C. § 24(Fifth) ("dismiss such officers or any of them at pleasure"), and cases interpreting these statutes. *See Mele v. Fed. Reserve Bank*, 359 F.3d 251, 255 (3d Cir. 2004) (analyzing both Federal Reserve Act and Federal Home Loan Bank Act cases); *Kroske v. US Bank Corp.*, 432 F.3d 976 (9th Cir. 2005), *as amended* 2006 U.S. App. LEXIS 3367 (Feb. 13, 2006) (considering

> "To appoint by its board of directors a president, vice presidents, and such officers and employees as are not otherwise provided for in this Act, to define their duties, require bonds for them and fix the penalty thereof, and to *dismiss at pleasure* such officers or employees." (emphasis added)

The New York Fed argues, consistent with the decisional law of several Circuits and other courts, that this "at pleasure" language precludes the application of state employment discrimination or whistleblower laws that restrict "at pleasure" dismissal, or, at the very least, preempts such state laws to the extent they impose *additional* burdens beyond federal law such as the ADA, which already apply to the Federal Reserve Banks. The District Court followed several other courts and concluded instead that no preemption occurred, regardless of the additional burdens imposed by CEPA and LAD above and beyond federal law, and regardless of the inconsistencies each Federal Reserve Bank would face from various state and local laws. According to this rationale, because Title VII applies to Federal Reserve Banks, then § 341(Fifth) permits employment discrimination laws to limit the Banks' discretion in firing. Therefore, the argument goes, state discrimination laws would not conflict with § 341(Fifth) *even if* the state laws impose additional burdens beyond federal law because they have a common purpose.

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in parallel Federal Reserve Act and Federal Home Loan Bank Act); *Arrow v. Fed. Reserve Bank of St. Louis*, 358 F.3d 392 (6th Cir. 2004) (noting identical holdings under Federal Reserve Act and National Bank Act); *Andrews v. Fed. Home Loan Bank of Atlanta*, 998 F.2d 214 (4th Cir. 1993) (citing Federal Reserve Act in support of ruling on Federal Home Loan Bank Act).

In order to fully analyze § 341(Fifth), we must also ask what effect, if any, the passage of the ADA and federal whistleblower statute had on this far older language in the Federal Reserve Act. Section 341(Fifth) was originally enacted almost a hundred years ago. Federal Reserve Act of 1913, Pub. L. No. 63-43, ch. 6, § 4, 38 Stat. 254. Subsequent amendment in 1935 left the original "at pleasure" language unchanged, and merely clarified that a president and vice presidents could be appointed.[9] Act of August 23, 1935, ch. 614, § 201, 49 Stat. 703. The ADA, by contrast, was enacted in 1990, Pub. L. No. 101-336, 104 Stat. 328, 42 U.S.C. § 12101 *et seq.*, and has been applied to Federal Reserve Banks. *See, e.g., Wernick v. Fed. Reserve Bank of New York*, 91 F.3d 379 (2d Cir. 1996). The federal banking whistleblower statute, 12 U.S.C. § 1831j, as applicable to Federal Reserve Banks, was enacted in 1991. Act of December 19, 1991, Pub. L. No. 102-242, § 251(a)(1)-(3), 105 Stat. 2331.

In order to reconcile the applicability of these federal statutes *limiting* the Federal Reserve Banks' discretion in personnel decisions with § 341(Fifth)'s grant of broad power to dismiss employees "at pleasure," we are compelled to conclude that the ADA and 12 U.S.C. § 1831j impliedly amended § 341. *See Kroske v. US Bank Corp.*, 432 F.3d 976, 989 (9th Cir. 2005), *as amended* 2006 U.S. App. LEXIS 3367 (Feb. 13, 2006); *Evans v. Fed. Reserve Bank of Phila.*, 2004 U.S. Dist. LEXIS 13265 (E.D. Pa. July 8, 2004); *Peatros v. Bank of Am.*, 990 P.2d

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[9] As originally enacted, § 341(Fifth) read: "To appoint by its board of directors, such officers and employees as are not otherwise provided for in this Act, to define their duties, require bonds of them and fix the penalty thereof, and to dismiss at pleasure such officers or employees."

539 (Cal. 2000). We are aware that implicit amendment or repeal is rare in the law. "The cardinal rule is that repeals by implication are not favored." *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936). We may find such repeal or amendment only if "the two acts are in irreconcilable conflict, or [if] the later statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it . . . ." *Id.* at 504. We have said that "[w]henever possible, the two statutes should be read in order to give effect to both." *Tineo v. Ashcroft*, 350 F.3d 382, 391 (3d Cir. 2003).

We are concerned here only with the first category of implied amendment, as neither the ADA nor 12 U.S.C. § 1831j "covers the whole ground occupied" by Federal Reserve Act § 341. These statutes do, however, "irreconcilabl[y] conflict."

Section 341(Fifth) grants Federal Reserve Banks the absolute, unlimited power to dismiss an employee. The ADA and 12 U.S.C. § 1831j, on the other hand, *prohibit* a Federal Reserve Bank from dismissing an employee on the ground of a covered disability, from refusing to grant an employee's request for an accommodation, or from dismissing an employee for having filed a complaint alleging a violation of law. Thus, a Federal Reserve Bank's absolute unconditioned legal right to dismiss under § 341(Fifth), is made *illegal* under the ADA and 12 U.S.C. § 1831j. Such a fundamental conflict is not "merely cosmetic," or one "that relates to anything less than the operative legal concepts." *Tineo*, 350 F.3d at 391.

We must conclude, therefore, that to the extent that the ADA and 12 U.S.C. § 1831j irreconcilably conflict with § 341(Fifth), these statutes have impliedly amended § 341(Fifth) to grant a Federal Reserve Bank "a *limited*

power to dismiss any of its officers at pleasure by its board of directors, not extending to dismissal" on grounds prohibited by the ADA or 12 U.S.C. § 1831j. *Peatros,* 990 P.2d at 549-50. The corollary, as we conclude below, is that "as impliedly amended by [the ADA and 12 U.S.C. § 1831j, § 341(Fifth)] bestows *a qualified* immunity from liability arising from its exercise, allowing only specified relief, with limits and/or bars against compensatory and/or punitive damages." *Peatros,* 990 P.2d at 550. Our only remaining task is to determine whether, as impliedly amended by the ADA and 12 U.S.C. § 1831j, § 341(Fifth) of the Federal Reserve Act preempts the application of CEPA or the LAD to a Federal Reserve Bank's dismissal of an employee.

B. Federal Reserve Act Conflict Preemption

In determining whether the Federal Reserve Act preempts, either in whole or in part, New Jersey's CEPA and LAD, we wade into murky waters. Our own case law in the area is sparse. We held recently that the "at pleasure" language of § 341(Fifth) bars all *contractual* employment claims against a Federal Reserve Bank, *see Mele v. Fed. Reserve Bank,* 359 F.3d 251, 255 (3d Cir. 2004), but have not officially addressed the preemption of *statutory* employment claims. Cf. *Sheehan v. Anderson,* 2000 U.S. Dist. LEXIS 3048, at *19 (E.D. Pa. Mar. 17, 2000), *aff'd* 263 F.3d 159 (3d Cir. 2001) (table) (holding that § 341(Fifth) "preempts any state created employment right," summarily affirmed).

We begin by surveying the limited case law around the country. The Sixth Circuit appears to be the only one of our sister Courts of Appeals to have addressed the preemption issue with regard to the Federal Reserve Act,

but it provided no analysis to support its conclusion that a Federal Reserve Bank employee's state law employment discrimination claims "were preempted by federal law. Section 4, Fifth, of the Federal Reserve Act, 12 U.S.C. § 341, Fifth . . . preempts any statecreated employment right to the contrary." *Ana Leon T. v. Fed. Reserve Bank of Chicago*, 823 F.2d 928, 931 (6th Cir. 1987). The Sixth Circuit has since reaffirmed this holding, but added no further explanation. *See Arrow v. Fed. Reserve Bank of St. Louis*, 358 F.3d 392, 393 (6th Cir. 2004).

The well is a bit deeper with regard to national banks and Federal Home Loan Banks, which, as we have noted above, are governed by federal statutes with "at pleasure" clauses identical to that of § 341(Fifth). Two Circuits have explicitly found total preemption of state statutory employment law. The Fourth Circuit has held that "at pleasure" in the Federal Home Loan Bank Act completely preempts state law claims. *Andrews v. Fed. Home Loan Bank of Atlanta*, 998 F.2d 214, 220 (4th Cir. 1993). The Sixth Circuit found similar total preemption would be accomplished by "at pleasure" in the National Bank Act. *Wiskotoni v. Mich. Nat'l Bank-West*, 716 F.2d 378, 387 (6th Cir. 1983) (noting that § 24(Fifth) of the National Bank Act "has consistently been construed by both federal and state courts as preempting state law governing employment relations between a national bank and its officers and depriving a national bank of the power to employ its officers other than at pleasure"), *reaffirmed by Arrow*, 358 F.3d at 394. These "total preemption" holdings suggest that *any* state-created limitation on the bank's power would fundamentally, and irreconcilably, conflict with Congress's intent to grant total, unlimited discretion. *See Andrews*, 998 F.2d at 220

("In this case, however, Congress intended for federal law to define the discretion which the Bank may exercise in the discharge of employees. Any state claim for wrongful termination would plainly conflict with the discretion accorded the Bank by Congress.").

Moderating these total preemption holdings are a variety of courts taking the more limited approach of partial conflict preemption of state employment laws. In general, these courts have concluded that § 341(Fifth) (and, analogously, provisions in the National Bank Act and National Home Loan Bank Act) preempts state laws only to the extent that the state laws provide additional remedies or liability *beyond* the federal antidiscrimination laws (such as Title VII or the ADEA) that have already impliedly amended § 341(Fifth). This has resulted in courts finding certain state laws to not be preempted, because those state laws exactly paralleled federal law. *See, e.g., Kroske,* 432 F.3d at 989 ("Congress did not intend for § 24(Fifth) [of the National Bank Act] to preempt the WLAD employment discrimination provisions, *at least insofar as they are consistent* with the prohibited grounds for termination under the ADEA.") (emphasis added); *Moodie v. Fed. Reserve Bank of New York,* 831 F. Supp. 333, 337 (S.D.N.Y. 1993) ("The New York State Human Rights Law, with provisions analogous to Title VII, creates no additional employment rights in conflict with the Bank's status as an employer at will, nor does it place additional constraints on the Bank's exercise of its statutory powers."). On the other hand, where the state law at issue went beyond the relevant federal law, courts do not hesitate to find conflict preemption. *See, e.g., Evans,* 2004 U.S. Dist. LEXIS 13265 (Pennsylvania Human Relations Act preempted, as beyond ADEA or Title VII); *Peatros v. Bank of Am.,* 990 P.2d 539 (Cal.

2000) (California Fair Employment and Housing Act preempted to extent it conflicts with Title VII and ADEA).

It is this latter partial conflict preemption approach which we find persuasive, and count ourselves fortunate to have the benefit of a very well-reasoned opinion of Judge Padova of the Eastern District of Pennsylvania, issued after the District Court's initial opinion in the instant case. *See Evans,* 2004 U.S. Dist. LEXIS 13265. *Evans* involved an employee of the Federal Reserve Bank of Philadelphia who sued the Philadelphia Fed and various employees for alleged discrimination and retaliation. After surveying the same available case law we have referenced above, Judge Padova concluded that "the 'dismiss at pleasure' language in the Federal Reserve Act preempts the application of state anti-discrimination laws which expand the rights and remedies available under federal antidiscrimination laws." *Id.* at *16. Because the Pennsylvania Human Relations Act at issue in *Evans* significantly expanded both the substantive and the procedural remedies available to a plaintiff relative to the remedies available under the ADEA and Title VII, Judge Padova "dismiss[ed] Plaintiff's state law claims in their entirety." *Id.* at *21.

We adopt the same partial conflict preemption approach. We first reject the District Court's conclusion that *Mele* defined the outward limit of the preemptive power of "at pleasure," such that only contractual employment claims are preempted. *Mele* did not address statutory claims as we are faced with today, and did not so limit itself. Logically, "at pleasure" cannot be limited to contractual claims. As the Ninth Circuit has noted, "it would make little sense to allow state tort claims to proceed, where a former bank officer's contract claims are barred [by the

National Bank Act]." *Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 526 (9th Cir. 1989). The same rationale applies to permitting statutory claims where contractual claims would be barred – any discretion granted to the Federal Reserve Banks by Congress would be mooted by the possibility of having to face statutory employment claims. *See id.* ("The effect would be to substitute tort for contract claims, thus subjecting the national bank to all the dangers attendant to dismissing an officer. The purpose of the provision in the National Bank Act was to give those institutions the greatest latitude possible to hire and fire their chief operating officers, in order to maintain the public trust.").

Federal Reserve Act § 341(Fifth), as impliedly amended by the ADA and 12 U.S.C. § 1831j, preempts *any* state employment law that goes beyond the remedies and protections provided by those federal laws. Such "additional" provisions—including provision for unlimited punitive damages, individual liability on the part of employees, and coverage of less severe disabilities—would conflict with Congress's intent to provide Federal Reserve Banks with the broadest latitude possible in carrying out their statutory duties, while giving due recognition to the applicability of the ADA and 12 U.S.C. § 1831j's requirements. In this sense, additional state remedies surely "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English*, 496 U.S. at 79.

Moreover, as we recently noted in *Surrick:*

> "If preemption only applied to state laws that directly contradict federal laws, federal laws could be effectively nullified by state laws prohibiting those acts that are incident to, but not specifically

> authorized by, federal law. Under such a regime, state officials would have a 'virtual power of review' over federal laws."

Surrick, 449 F.3d at ____, 2006 U.S. App. LEXIS 13618, at *32 (quoting *Sperry*, 373 U.S. at 385). Thus, broad state employment laws cannot apply to the Federal Reserve Banks when those state laws "prohibit[ ] those acts that are incident to" Federal Reserve Banks dismissing "at pleasure" their employees, within the bounds of the ADA and 12 U.S.C. § 1831j.[10]

In sum, we are persuaded that the wisest approach when faced with an entity undeniably crucial to the federal monetary system, to which Congress has clearly expressed the intent to grant the broadest possible power and right to dismiss employees, is to limit remedies to those already authorized by Congress. We need not take a position on whether state remedies exactly consonant with the ADA and 12 U.S.C. § 1831j would similarly offend "the full purposes and objectives of Congress." As we detail below, by no stretch of the imagination can

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[10] In such an intricate area of the law, we believe it is important to be clear about which statutes we are addressing. We reiterate that we are dealing with the direct preemptive effect of the Federal Reserve Act, § 341(Fifth), and not with the indirect preemptive effect of the ADA or 12 U.S.C. § 1831j. The ADA, for example, explicitly saves state anti-discrimination statutes from direct preemption, and does not preempt the Federal Reserve Act. It would be a mistake, however, to argue that because the *ADA* preempts neither the Federal Reserve Act nor CEPA or LAD, the *Federal Reserve Act* cannot have such preemptive force. *See Shaw v. Delta Air Lines*, 463 U.S. 85, 101 n.22 (1983) (argument "simplistic" and properly rejected); *Evans*, 2004 U.S. Dist. LEXIS 13265, at *19-20. Application of CEPA or the LAD frustrates the Congressional purpose behind § 341(Fifth), as impliedly amended by the ADA and 12 U.S.C. § 1831j. *See supra* Part V.A.

CEPA or the LAD be said to "parallel" or "mirror" their federal counterparts.

C. CEPA and LAD

Because § 341(Fifth) preempts state employment laws that provide remedies *beyond* those permitted in the ADA or 12 U.S.C. § 1831j, what remains is to determine whether CEPA or the LAD are indeed such expansive laws. We hold that they are, and are therefore preempted to the extent of these divergences. We will adopt the *Evans* approach and decline to usurp the New Jersey legislature's province by rewriting these state laws. Therefore, we will remand the case to the District Court with instructions to dismiss Fasano's Complaint.

Both the LAD and CEPA go well beyond their federal counterparts. *See Dist. Ct. Op. (Mar. 31,* 2004) at *18-23. For example, neither the ADA nor 12 U.S.C. § 1831j[11] permit individual damages liability on the part of employees. *Koslow v. Pennsylvania,* 302 F.3d 161, 178 (3d Cir. 2002) (ADA). The LAD permits the imposition of individual liability on an employee who has aided or abetted barred acts. *Tarr v. Ciasulli,* 853 A.2d 921 (N.J. 2004). Of particular importance to an

[11] While no Circuit appears to have directly held that 12 U.S.C. § 1831j does not permit individual liability, several District Courts have so held, with no contrary authority brought to our attention. *See, e.g., Rouse v. Farmers State Bank,* 866 F.2d 1191 (N.D. Iowa 1994); *Hicks v. Resolution Trust Corp.,* 767 F. Supp. 167 (N.D. Ill. 1991). The Fifth Circuit has held that 12 U.S.C. § 1831j "applies only to the actors named in the statute," the only actors being certain types of *institutions. Nowlin v. Resolution Trust Corp.,* 33 F.3d 498, 503 (5th Cir. 1994). The District Court accepted that CEPA provided for individual liability, in contrast to 12 U.S.C. § 1831j. *Dist. Ct. Op.* (Mar. 31, 2004) at *22.

employer, the LAD permits an employee to directly pursue a claim in Superior Court, without first pursuing an administrative complaint. *Hernandez v. Region Nine Hous. Corp.*, 684 A.2d 1385, 1389 (N.J. 1996).

The LAD unquestionably protects a broader range of "disabilities" or "handicaps" than the ADA. The ADA limits covered disabilities to those which "substantially limit[ ] one or more of the major life activities." 42 U.S.C. § 12102(2)(A). In contrast, Fasano would be able to prove disability under the LAD by merely showing, for example, "physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness . . . any degree of paralysis, amputation, lack of physical coordination . . . or any mental, psychological or developmental disability . . . which prevents the normal exercise of any bodily or mental functions." N.J. Stat. Ann. § 10:5-5(q) (West 2006). The LAD, therefore, imposes a significantly "lower standard" than the ADA. *Failla v. City of Passaic*, 146 F.3d 149, 154 (3d Cir. 1998); *see also Motley v. New Jersey State Police*, 196 F.3d 160, 165 n.5 (3d Cir. 1999) (noting the "more stringent ADA standard"). *Accord Viscik v. Fowler Equip. Co.*, 800 A.2d 826 (N.J. 2002). The LAD also expands the recovery options available to a successful plaintiff. *See, e.g., Lanni v. New Jersey*, 259 F.3d 146, 149 (3d Cir. 2001) (unlike ADA, a LAD award "may reflect any risk of nonpayment of a fee assumed by counsel" and apply a multiplier enhancement). LAD damages are uncapped. *Baker v. Nat'l State Bank*, 801 A.2d 1158, 1165-66 (N.J. Super. Ct. App. Div. 2002).

The differences are also apparent with respect to CEPA. CEPA provides extremely "broad protections against employer retaliation." *Mehlman v. Mobil Oil*

Corp., 707 A.2d 1000, 1008 (N.J. 1998); *see also id.* ("[A]t the time of its enactment [CEPA was described as] the most far-reaching 'whistleblower statute' in the nation."). CEPA allows for individual employee liability, *Palladino ex rel. United States v. VNA of S. N.J., Inc.*, 68 F. Supp. 2d 455, 474 (D.N.J. 1999), while as noted above, 12 U.S.C. § 1831j does not. 12 U.S.C. § 1831j protects a Federal Reserve Bank employee from retaliation for disclosing suspected wrongdoing to a very circumscribed list of entities: the Bank itself, a federal banking agency, or the Attorney General. 12 U.S.C. § 1831j(a)(2). By contrast, CEPA permits an employee to complain to *any* public body, N.J. Stat. Ann. § 34:19-3 (West 2006), about virtually any topic, even those within the employee's own control.

In sum, Fasano's belated attempt to claim that the LAD and CEPA are merely parallel and consonant with the ADA and 12 U.S.C. § 1831j is meritless. We conclude that both CEPA and the LAD provide remedies and substantive protections that go far beyond their federal analogs. These additional provisions, by further limiting the New York Fed's ability to exercise the broad "dismiss at pleasure" discretion granted it by Congress, frustrate that Congressional purpose, and cannot be applied to Federal Reserve Banks due to conflict preemption.

The final matter we must address is whether our proper course of action is to dismiss Fasano's Complaint or to attempt to pare back CEPA and the LAD to exactly match the ADA and 12 U.S.C. § 1831j.

We conclude that we would be ill-suited for the latter task. We agree with Judge Padova that instead of attempting to "essentially rewrite the relevant provisions of the [CEPA and LAD] to parrot Federal anti-discrimination law," and "risk frustrating the intent of the pub-

licly elected legislature which enacted the [CEPA and LAD] in the first place," dismissal is appropriate. *See Evans*, 2004 U.S. Dist. LEXIS 13265, at *21. There is simply no way to give full effect to such state laws while picking and choosing which parts of them may apply. For example, as noted above the LAD does not require exhaustion of administrative remedies; a plaintiff elects whether to proceed in the administrative arena, or in court, but a final decision in either forum is binding and renders the other forum unavailable. Were we to graft the ADA's exhaustion requirement onto the LAD, we would transform formerly final, binding administrative determinations into non-binding preliminaries to litigation. We will not step on the toes of the New Jersey legislature in this or any other like manner.

VI.

New Jersey undoubtedly has a very strong interest in requiring employers to abstain from discriminatory practices, the range of which New Jersey has chosen to define as broadly as possible. Nonetheless, "preemption analysis does not involve a balancing of state and federal interests. Once it is determined that there is a conflict between a valid federal law and a state law, the state law must give way." *Surrick*, 449 F.3d at ___, 2006 U.S. App. LEXIS 13618, at *36. State anti-discrimination laws that do not mirror their federal analogs cannot be validly applied to the New York Fed by virtue of conflict preemption with § 341(Fifth) of the Federal Reserve Act.

For the foregoing reasons, we conclude that Fasano's Complaint must be dismissed due to the preemption of her state law claims by the Federal Reserve Act. Accordingly, we will reverse and remand the case.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 03-CV-672 (JLL)

MAUREEN FASANO,

Plaintiff,

v.

FEDERAL RESERVE BANK OF NEW YORK, et al.,

Defendants.

OPINION & ORDER

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LINARES, District Judge.

INTRODUCTION

This matter comes before this Court on a motion by Defendants Federal Reserve Bank of New York ("FRB"), Ron Henry, Cynthia Ramos, Leroy Hope, Dottie Boyd, Kim Russo, Lisa Young, and Mertha Jakubiszen (hereinafter collectively "Defendants"), for reconsideration of this Court's March 31, 2004 Opinion and Order pursuant to L. Civ. R. 7.1(g), or certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). This Court considered submissions in support and opposition of the motion. This matter is resolved without oral argument. Fed. R. Civ. P. 78. For the reasons set forth below, Defendants' motion for reconsideration is DENIED. Alternatively, Defendants' motion for certification of interlocutory appeal is GRANTED.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A detailed factual background of this case is set forth in an earlier Opinion and Order of this Court entered March 31, 2004 ("Op. & Order"), and will not be repeated here, except where necessary to provide context for the pending motion for reconsideration and request

for certification of an interlocutory appeal. On December 18, 2001, Plaintiff Maureen Fasano (hereinafter "Fasano" or "Plaintiff") initiated suit against Defendants in New Jersey Superior Court, for retaliation and failure to accommodate in violation of the New Jersey Conscientious Employment Act ("CEPA"), N.J.S.A. 34:19-1 *et. seq.*, and the New Jersey Law Against Discrimination ("LAD"), N.J. S.A. 10:5-1 *et. seq.*. After removal to this Court, Defendants moved to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and failure to state a claim on which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). In the March 31 Opinion and Order, this Court denied Defendants' motions, holding that the FRB is a private corporation subject to state employment claims. (Op. & Order at 6-12). Furthermore, applying the preemption test for private employers, this Court determined that Defendants had not met their burden of demonstrating field preemption. (*Id.* at 12-14). In addition, analyzing the relevant state and federal laws,[1] this Court determined that they did not conflict sufficiently to warrant preemption. (*Id.* at 14-23).

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[1] Specifically, this Court analyzed whether CEPA or LAD conflict with the Federal Reserve Act, 12 U.S.C. § 341 (Fifth), the Americans with Disabilities Act, 12 U.S.C. § 12101 *et. seq.*, or the federal whistleblower statute, 12 U.S.C. § 1831j.

LEGAL DISCUSSION

I. Motion for Reconsideration

A. Legal Standard

Prior to reaching the merits of a motion for reconsideration, the Court "must decide whether the arguments are properly raised under Local [Civil] Rule 7.1(g)". *Holten v. Chevron U.S.A.*, 2002 U.S. Dist. LEXIS 17600, at *5 (D.N.J. Oct. 3, 2001). This rule provides in relevant part:

> A motion for reargument shall be served and filed within 10 days after the entry of the order or judgment on the original motion by the Judge or Magistrate Judge. There shall be served with the notice a brief setting forth concisely the matters or controlling decisions which counsel believed the Judge or Magistrate Judge has overlooked.

L.Civ.R. 7.1(g). The motion may not be used to re-litigate old matters, or argue new matters that could have been raised before the original decision was reached. *P. Schoenfeld Assets Mgmt., L.L.C. v. Cendant Corp.*, 161 F. Supp. 2d 349, 352 (D.N.J. 2001); *NL Indust., Inc. v. Commercial Union Ins. Co.*, 935 F. Supp. 513, 516 (D.N.J. 1996). Rather, "the motion may address only those matters of fact or issues of law which were presented to, but not considered by, the court in the course of making the decision at issue." *Holten*, 2002 U.S. Dist. LEXIS 17600, *6 (citing *Student Pub. Interest Research Group of N.J. v. Monsanto Co.*, 727 F. Supp. 876, 878 (D.N.J.), *aff'd*, 891 F.2d 283 (3d Cir. 1989).

Relief by way of motion for reargument is "an extraordinary remedy" that is to be granted "very sparingly." *Yurecko v. Port Auth. Trans-Hudson Corp.*, 279 F. Supp.

2d 606, 608 (D.N.J. 2003); *Sagaral v. Mountainside Hosp.*, 2001 U.S. Dist. LEXIS 6872, at *3 (D.N.J. Mar 28, 2001); *NL Indus., Inc.*, 935 F. Supp. at 516. The purpose of a motion for reargument is "to correct manifest errors of law or fact or to present newly discovered evidence." *Harasco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985), *cert. denied*, 476 U.S. 1171 (1986); *Tischio v. Bontex, Inc.*, 16 F. Supp. 2d 511, 532 (D.N.J. 1998). Only in circumstances "where matters were overlooked and which, if considered by the Court, might reasonably have resulted in a different conclusion, will the Court entertain such a motion." *Bowers v. Nat'l Collegiate Athletic Ass'n*, 130 F. Supp. 2d 610, 613 (D.N.J. 2001). On the other hand, mere disagreement with the Court's decision is inappropriate on a motion for reargument, and should instead be raised through the normal appellate process. *Holten*, 2002 U.S. Dist. LEXIS 17600, at *6. Accordingly, reconsideration motions "will be granted only where (1) an intervening change in the law has occurred, (2) new evidence not previously available has [e]merged, or (3) the need to correct a clear error of law or prevent a manifest injustice arises." *Id.* at *7 (citing *North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995)). With this legal framework in mind, the Court will now consider Defendant's motion for reconsideration.

B. Entitlement to Reconsideration

Before evaluating the merits of the motion for reconsideration, the Court must first determine whether Defendants' arguments are properly raised under Local Rule 7.1 (g). In order for an argument to be considered properly raised, Defendants must concisely set forth dispositive facts or controlling decisions of law which they claim this Court has overlooked. This Court finds that all

arguments now raised by Defendants were previously raised and already considered by this Court in deciding Defendants' original motion to dismiss. Furthermore, Defendants have failed to demonstrate that there has either been an intervening change in law or a controlling decision that this Court overlooked. Accordingly, Defendants are not entitled to reconsideration of the decision.

Initially, Defendants move for reconsideration on the grounds that this Court committed error in overlooking the significance of cases that distinguish the concepts of federal agency and federal instrumentality. In fact, this Court has already considered, and rejected, Defendants' argument that the FRB is an instrumentality. (Op. & Order at 6-12). In the original analysis of Defendant's motion to dismiss, this Court cited an abundance of authority to support the holding that the FRB is a private corporation rather than an instrumentality. (*Id.*). Furthermore, this Court discussed and distinguished cases that found the FRB to be an instrumentality. (*Id.* at 10-12) (distinguishing *Goodyear v. Miller*, 486 U.S. 174 (1988); *Fed. Reserve Bank of St. Louis v. Metrocentre Improvement Dist.*, 657 F.2d 183 (8th Cir. 1981); *Hancock v. Train*, 426 U.S. 167 (1976)); and *Fed. Reserve Bank of Boston v. Comm'r of Corps. & Taxation*, 499 F.2d 60 (1st Cir. 1974)).

In their brief in support of the motion for reconsideration, Defendants rely heavily on *McCulloch v. Maryland*, 17 U.S. 316 (1819), arguing that this Court overlooked the Supremacy Clause in the March 31, Opinion. Specifically, Defendants contend that the holding of *McCulloch* is not limited solely to taxation. Rather, Defendants argue that the *McCulloch* holding was designed to keep federal government activity free from any type of state interference, absent clear Congressional authorization. However, this argument was

never raised in Defendants' original memorandum in support of their motion to dismiss. In their initial memorandum, Defendants assert that "[t]he *McColloch* holding is unambiguous: 'the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.' " (Defs.' Mem. in Supp. of Mot. to Dismiss at 9) (citing *McCulloch*, 17 U.S. at 436 (emphasis added)). This Court has already distinguished the instant case from cases involving the issue of state taxation of Federal Reserve Banks. (Op. & Order at 10). Moreover, at no point in their original memorandum did Defendants' argue that the preemption analysis of *McCulloch* extended beyond taxation claims to cover "any attempt by states to 'retard, impede, burden or in any matter control' the operations of the United States and its instrumentalities, including the nation's central banks." (Defs.' Mem. in Supp. of Mot. for Recons. & Req. for Interlocutory Appeal at 8) (quoting *McCulloch*, 17 U.S. at 436). Since this argument was not raised before the original decision was reached, it cannot be entertained by this Court in the context of this motion for reconsideration. *See P. Schoenfeld Assets Mgmt.*, 161 F. Supp. 2d at 352.

Defendants also contend that classifying the FRB as a private, non-governmental employer, led to the application of the incorrect preemption standard. This argument is entirely based on the contention that the FRB is an instrumentality rather than a private employer. As previously mentioned, this Court thoroughly analyzed an abundance of case law before holding the FRB to be a private, non-governmental employer. Defendant's mere disagreement with this Court's characterization of the FRB as a private employer is not appropriate on a motion for reconsideration. *See Holten*, 2002 U.S. Dist. LEXIS 17600, at *6. Defendants do not assert that the

preemption analysis applied by this Court was inappropriate for private employers. Therefore, Defendants have not met their burden of demonstrating either matters of fact or issues of law which this Court overlooked in issuing the March 31 Opinion and Order.

Finally, in support of their motion for reconsideration, Defendants direct this Court's attention to a decision issued in the Eastern District of Pennsylvania shortly after Defendants' motion to dismiss was denied. Specifically, Defendants assert that *Evans v. Fed. Reserve Bank of Philadelphia*, 2004 U.S. Dist. LEXIS 13265 (E.D. Pa. July 8, 2004), stands in direct conflict with this Court's preemption analysis in the March 31 Opinion and Order. Since it was decided in the Eastern District of Pennsylvania, *Evans* is not binding on this Court and, therefore, does not qualify as an intervening change in law. *See Holten*, 2002 U.S. Dist. LEXIS 17600, at *14 (citing *NL Indust., Inc*, 935 F. Supp. at 516). Consequently, Defendants are not entitled to reconsideration.

II. Request for Interlocutory Appeal

A. Legal Standard

Pursuant to 28 U.S.C. § 1292(b), Defendants request that this Court certify the March 31 Opinion and Order for interlocutory appeal. Section 1292(b) provides:

> When a district judge, in making a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of

> Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b). In other words, in order for certification of interlocutory appeals to be appropriate, each of three criteria must be satisfied: "the matter must (1) involve a controlling question of law; (2) offer substantial ground for difference of opinion as to its correctness; and (3) materially advance the ultimate termination of the litigation." *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir. 1974). However, because interlocutory appeals under § 1292(b) stand in contrast to the policy of avoiding "piecemeal appellate review of trial court decisions which do not terminate the litigation," they should be used sparingly. *Cardona v. Gen. Motors Corp.*, 939 F. Supp. 351, 353 (D.N.J. 1996) (quoting *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982). Accordingly, "the court must remember that . . . [a] motion should not be granted merely because a party disagrees with the ruling of the district judge." *Id.* (quoting *Max Daetwyler Corp. v. Meyer*, 575 F. Supp. 280, 282 (E.D. Pa. 1983)).

B. Entitlement to Certification

An issue is deemed to be a 'controlling question of law' if its incorrect disposition would require reversal of the final judgment on appeal. *Id.* (quoting *Katz*, 496 F.2d at 755). Here, the issue of whether or not the Federal Reserve Act ("FRA") preempts Plaintiff's state law

claims is clearly a 'controlling question of law.' Indeed, Plaintiff does not oppose Defendants' arguments as to this prong. If, on appeal, it was decided that the FRA did in fact preempt Plaintiff's state law claims, this action would have to be dismissed for lack of subject matter jurisdiction. Because the Court is dealing with a 'controlling question of law', it must determine whether or not there is a "substantial ground for difference of opinion" as to the correctness of this Court's analysis in the March 31 Opinion and Order.

As previously mentioned, "a party's mere disagreement with the district court's ruling does not constitute a 'substantial ground for difference of opinion' within the meaning of § 1292(b). *Id.* Rather, in order for there to be "substantial ground for difference of opinion," there must be "a genuine doubt as to the correct legal standard." *Id.* In light of the differences of opinion regarding the degree to which the FRA preempts state anti-discrimination laws, this Court finds that a 'substantial ground for difference of opinion' exists. As discussed in detail by this Court in the March 31 Opinion and Order, some courts have found that the 'at pleasure language' in the FRA[2] conflicts with, and thereby preempts, *all state employment claims.* (Op. & Order at 15-16) (discussing *Leon v. Fed. Reserve Bank of Chicago*, 823 F.2d 928 (6th Cir. 1987) (rights under Michigan law

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[2] The FRA provides in relevant part:

"A federal reserve bank . . . shall have the power to . . . appoint by its board of directors a president, vice presidents, and such officers and employees as are not otherwise provided for in this chapter, to define their duties, require bonds for them and fix the penalty thereof, and *to dismiss at pleasure such officers or employees.*"

12 U.S.C. § 341(Fifth) (emphasis added).

preempted by federal law); *Arrow v. Fed. Reserve Bank of St. Louis*, 358 F.3d 392 (6th Cir. 2004) (FRA preempted state law claims); *Kispert v. Fed. Home Loan of Cincinnati*, 778 F. Supp. 950 (S.D. Ohio 1991) (Federal Home Loan Bank Act preempted Bank employee's state law claims); and *Aalgaard v. Merchants Nat'l Bank*, 224 Cal. App. 3d 674 (1990) (National Bank Act preempted Bank employee's state law claims) (emphasis added); *see also Osei-Bonsu v. Fed. Home Loan Bank*, 726 F. Supp. 95, 98 (S.D.N.Y. 1989) (state human rights agency's jurisdiction over claim of racial discrimination against bank preempted by Federal Home Loan Bank Act).

District Courts within the Third Circuit have also adopted this line of reasoning. For example, the court in *Sheehan v. Anderson*, held that the 'at pleasure language' preempts any state created employment right. 2000 U.S. Dist. LEXIS 3048, at *19-20 (E.D. Pa. Mar. 17, 2000) (citing *Leon*, 823 F.2d at 931) (emphasis added). Although *Sheehan* dealt primarily with contractual employment claims, the Eastern District of Pennsylvania specifically dealt with the FRA preemption of state anti-discrimination laws in the recent opinion *Evans v. Federal Reserve Bank of Philadelphia*, 2004 U.S. Dist. LEXIS 13265 (E.D. Pa. July 8, 2004). In *Evans*, after an in depth discussion of the relevant case law, Judge Padova concluded that "the 'dismiss at pleasure' language in the [FRA] preempts the application of state anti-discrimination laws which expand the rights and remedies available under federal anti-discrimination laws." *Id.* at *16. The *Evans* holding stands in direct contrast to the line of reasoning employed by this Court in the March 31 Opinion and Order.

As previously explained, this Court held in the March 31 Opinion and Order that the "at pleasure" language in

the Federal Reserve Act establishes an "at will" employment situation that preempts employment contract claims but not state law anti-discrimination claims. (Op. & Order at 16-18). This position is supported by cases in other jurisdictions. *See Katsiavelos v. Fed. Reserve Bank of Chicago*, 1995 WL 103308, at *4 (N.D. Ill. March 3, 1995) (bank subject to provisions of Illinois Human Rights Act); *Moodie v. Fed. Reserve Bank of New York*, 835 F. Supp. 751, 752-53 (S.D.N.Y. 1993) (New York State Human Rights Law not preempted by Federal Reserve Act); *White v. Fed. Reserve Bank*, 660 N.E.2d 493, 496 (Ohio Ct. App. 1995) (Bank employee's claim for handicap discrimination, under state law, was not preempted by Federal Reserve Act). Simply stated, the Federal Reserve Act's establishment of an at-will employment relationship in the Federal Reserve Banks does not transform into the preemption of state employment discrimination laws.

In light of the split in authority, this Court finds that a "substantial ground for difference of opinion" exists. *See, e.g., Khan v. Fed. Reserve Bank*, 2005 U.S. Dist. LEXIS 1543, at *39-40 (S.D.N.Y. Feb. 2, 2005) (noting "split in authority concerning whether state and local laws are preempted by the Federal Reserve Act and other banking provisions containing similar language"). Therefore, although this Court stands by the correctness of its March 31 decision, the Court acknowledges that these divergent approaches to the preemption analysis satisfy the second requirement for certification of interlocutory appeal.

The last criteria for certification of an interlocutory appeal is that it materially advance the ultimate termination of the litigation. Plaintiff argues that to permit interlocutory appeal would only serve to delay this case. However, a pronouncement by the Third Circuit as to the

appropriate preemption analysis to be applied to the FRA vis-a-vis state anti-discrimination laws could lead to a prompt termination of this suit. If the issue is resolved in Defendants' favor (i.e., the FRA preempts state anti-discrimination laws), it will indisputably result in a reversal of this Court's March 31 Opinion and Order and the dismissal of this action. *See United States v. A Parcel of Land, Bldgs., Appurtenances & Improvements*, 742 F. Supp. 189, 191 (D.N.J. 1990). Therefore, because all three criteria are satisfied, this Court shall exercise its discretion and certify the issue of whether the Federal Reserve Bank is immune from state employment discrimination law claims, particularly whether the FRA preempts state anti-discrimination laws, for appeal pursuant to 28 U.S.C. § 1292(b).

CONCLUSION

For the reasons set forth above, it is on this 5th day of August, 2005, hereby:

ORDERED that Defendants' motion for reconsideration is **DENIED**; and it is further

ORDERED that Defendants' motion for certification for interlocutory appeal is **GRANTED** to determine whether the Federal Reserve Bank is immune from employment discrimination claims under state law.

IT IS SO ORDERED.

/s/ Jose L. Linares
JOSE L. LINARES,
UNITED STATES DISTRICT JUDGE

DATED: August 5, 2005

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No.: 03-672 (JLL)

MAUREEN FASANO,

Plaintiff,

—v.—

FEDERAL RESERVE BANK OF NEW YORK, RON HENRY, CYNTHIA RAMOS, LEROY HOPE, DOTTIE BOYD, KIM RUSSO, LISA YOUNG and MERTHA JAKUBISZEN,

Defendants.

OPINION & ORDER

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LINARES, District Judge.

Plaintiff Maureen Fasano is a former employee of the Federal Reserve Bank of New York. She brought suit against the Federal Reserve Bank of New York and its employees Ron Henry, Cynthia Ramos, Leroy Hope, Dottie Boyd, Kim Russo, Lisa Young, and Mertha Jakubiszen, in their official and individual capacities (together "Defendants") for retaliation and failure to accommodate in violation of the New Jersey Conscientious Employment Act ("CEPA") and the New Jersey Law Against discrimination ("LAD"). Presently before this Court is Defendants' motion to dismiss Plaintiff's claims for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 1.2(b)(1) and failure to state a claim for which relief can be granted pursuant to Fed R. Civ. P 12(b)(6). The motion is resolved without oral argument. Fed. R. Civ. P. 78. For the reasons stated herein, Defendants' motion to dismiss is DENIED.

BACKGROUND

The Federal Reserve Bank of New York is one of twelve Federal Reserve Banks that constitute part of the larger Federal Reserve System, established by the Federal Reserve Act of 1913. *Enforcement Guidance on Coverage of Federal Reserve Banks,* EEOC Decision N–915-002, 1993 WL 452695, at *2 (Oct. 20, 1993). The nation's central bank comprises both private and public entities including the Board of Governors, a body that oversees the Federal Reserve Banks. *Id.* The twelve Banks are depositories for currency held in the United States Treasury, and serve as fiscal and monetary agents of the United States. The Banks also provide essential services regarding the public debt and government securities. The Federal Reserve Bank has a nine person board of directors—three directors are selected by regional member commercial banks, three directors are selected by member Federal Reserve Banks, and the Board of Governors selects the remaining three directors. *Id.* The daily operations of the Federal Reserve Banks are overseen by the directors of each bank, subject only to the overall oversight of the Board of Governors. *Id.*

The facts in this case are largely undisputed. Plaintiff Maureen Fasano was employed in the East Rutherford, New Jersey office of Defendant Federal Reserve Bank of New York from October 8, 2000 to July 31, 2002, as both a currency verification operator and junior operator. (Compl. ¶9). As a currency verification operator, Plaintiff's responsibilities included handling and washing money. *Id.* She claims that she consistently performed her duties in an exemplary manner, and met all of her employer's legitimate expectations. *Id.* Plaintiff was paid hourly and was required to sign in and out on a

time sheet every time she reported to and left work. (Compl. ¶ 10).

On or about August 15, 2001, Plaintiff received her regular paycheck, which apparently did not include all of the overtime pay that she was entitled to for that period. (Compl. ¶ 11). The next day, Plaintiff complained to Defendant Dottie Boyd (Supervisor) about her paycheck. (Compl. ¶ 12). Plaintiff was shown her time sheet, and she noticed that her sheet had been "whited-out" and hours were written in that were different from those that she actually worked. *Id.* After Plaintiff pointed out the "whited-out" time sheet, Boyd allegedly told her that other workers do not put in for overtime pay and, therefore, Boyd was not going to pay Plaintiff overtime. (Compl. ¶ 13).

About one week later, Plaintiff met with Defendants Cynthia Ramos (Assistant Staff Director) and Leroy Hope (Supervisor) to discuss the withheld overtime pay and alteration of the time sheet. Ramos told Plaintiff that she would receive the overtime pay but that she should not discuss the incident with anyone. (Compl. ¶ 15). Plaintiff asserts that one of her co-workers subsequently informed her that the Defendants would try to get her to quit because Plaintiff had started "trouble." (Compl. ¶ 13). In September 2001, Plaintiff complained to Human Resources that her pay was lower than other operators with less seniority and that she had not received a six month pay raise which was standard for someone in her position. (Compl. ¶ 17). Plaintiff also met with the Defendant Ron Henry (Staff Director) who asked her if she believed that she was being "prejudiced" against. She answered yes. *Id.* At the end of November 2001, Defendants assigned plaintiff to a "floater" position. (Compl. ¶ 18). She claims that before the assignment of the "floater" position, she worked in one room, four days

a week and engaged in heavy lifting on one of those days. As a floater, Plaintiff was assigned to different rooms and had to do heavy lilting every day that she worked. *Id.*

According to her Complaint, Plaintiff had a neck injury of which Defendants were aware that predated her employment with the Bank. (Compl. ¶ 19). Plaintiff alleges that Defendants knew that assigning Plaintiff to a floater position would substantially increase the likelihood that Plaintiff would become injured. *Id.* Plaintiff also has Type I diabetes which requires her to eat at regular intervals. (Compl. ¶ 20). She claims that her Supervisors, Defendants Russo, Jakubiszen, and Young, prevented her from taking necessary breaks during her shift. *Id.*

After commencing the new position, Plaintiff complained to Young and Russo that the lifting was "killing" her, but they took no action. (Compl. ¶ 21), She asserts that no other operators were assigned as permanent "floaters" or were required to engage in heavy lifting on a daily basis. *Id.* On or about December 18, 2001, Plaintiff injured her back from lifting at work and took long term disability leave. (Compl. ¶ 22). Plaintiff apparently continues to suffer from a slipped, bulging and/or herniated disc in her lower back and was unable to physically return to work. *Id.* She allegedly complied with all aspects of Defendants' Long Tenn Disability program. (Compl. ¶ 23). Defendants dispute this and state that Plaintiff failed to file an application for Long Term Disability benefits. (Defs.' Mot. Dismiss, 6). They also add that the Bank sent her a letter dated July 2, 2002 advising her that she was required to return to work on or before July 19, 2002, or, if she could not return, that she was required to file a claim for Long Term Disability benefits by that date. *Id.* Defendants argue that because

Plaintiff failed to return to work and did not file the application by the specified date, she was terminated effective July 31, 2002. *Id.* On August 6, 2002, Plaintiff received a letter from Defendants stating that she had been terminated on July 31, 2002. (Compl. ¶ 24). Plaintiff claims that this was the first time that she learned that she had been fired. *Id.*

Based on the facts outlined above, Plaintiff filed the present action in which she asserts three claims. First, Plaintiff alleges a violation of New Jersey's Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1 *et. seq.*, for being retaliated against because of her complaints regarding failure to pay overtime and the alteration of time records. (Pl. Br. Opp'n 13-15). Plaintiff's second claim is that Defendants discriminated against her in violation of the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 *et. seq.*, because she was denied accommodation for her handicap. Plaintiff's final claim is for retaliation under the LAD for seeking accommodation and for complaining about the discriminatory treatment she received. *Id.* The Complaint was filed with the New Jersey Superior Court on December 18, 2001. Defendants removed the action to this Court on February 14, 2003. Defendants have brought the present motion to dismiss alleging that this Court lacks subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1) and that Plaintiff has failed to state a claim for which relief can be granted pursuant to Fed R.Civ.P 12(b)(6).

DISCUSSION

A. *Federal Reserve Bank's Immunity from Suit*

As a threshold matter, this Court must first address the Federal Reserve Bank's contention that it is an instrumentality of the federal government and must therefore be immune from suit. For the reasons stated below, this Court agrees with Plaintiff that the Federal Reserve Bank should be treated as a private employer in this context and no immunity should be afforded.

Under the Supremacy Clause of the United States Constitution, Art VI, cl. 2, the activities of the federal government are immune from state regulation unless Congress explicitly provides otherwise. *See Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 180-181 (1988); *Hancock v Train,* 426 U.S. 167, 178-79 (1976). This immunity applies to government instrumentalities, installations, and property. *Id.* Therefore, if Defendant Federal Reserve Bank is considered an instrumentality of the federal government in this situation, it could not be sued in the present action. A line of decisions have considered the immunity of the Federal Reserve Bank in the employment discrimination context specifically. These cases support the proposition that the Federal Reserve Bank is not a government instrumentality, but in fact a private corporation subject to state employment claims. This Court finds these decisions persuasive and accordingly holds that the Federal Reserve Bank is subject to suit under the state law claims brought in the case at bar.

In 1993, the Equal Employment Opportunity Commission ("EEOC"), the agency charged with the interpretation of federal anti-discrimination laws, issued the *Enforcement Guidance on Coverage of Federal Reserve Banks.* EEOC Decision N–915-002, 1993 WL 452695

(Oct. 20, 1993). The EEOC concluded that "the Federal Reserve Banks are private . . . employers and . . . charges and complaints filed under the ADEA (Title VII, the EPA and the ADA) should be processed accordingly," instead of being processed as executive agencies under those statutes' federal sector provisions. *Id.* at *1. After thoroughly examining the structure of the Bank and relevant case law, the EEOC determined that Federal Reserve Banks are not corporations owned by the federal government, are not controlled by the government, and are not executive agencies (defined as either an executive department, government corporation or an independent establishment). *Id.* at *2-3. In support of its finding, the EEOC stated that:

> [A]ll shares of capital stock of Federal Reserve Banks are held by member commercial banks of each region, not by the United States . . . "executive departments" of the United States are listed at 5 U.S.C. § 101, and the list does not include the Federal Reserve Banks . . . . In addition, although the Board of Governors exercises broad supervisory authority over Federal Reserve Banks, the Federal Reserve Banks are not 'controlled' by the Board of Governors, an agency of the Government. . . . None of the Bank directors represents the federal government, and the government does not own any shares of capital stock in the Federal Reserve Banks. Moreover, the directors of each Federal Reserve Bank, not the Board of Governors, appoint the president and first vice president of the Banks (subject to Board approval) and oversee the general operation of the Banks.

Id. The EEOC also found that the legislative history of the Federal Reserve Act "indicates that Congress

intended that the Federal Reserve Banks would operate as private corporations, although there would be oversight by the Federal Reserve Board." *Id.* at *3.

This decision to treat Federal Reserve Banks as private corporations is in accordance with the characterization of the Federal Reserve Bank given by various courts. *See, e.g., United States Shipping Bd. Emergency Fleet Corp. v. Western Union Tel. Co.*, 275 U.S. 415, 425-426 (1928) (asserting that Federal Reserve Banks "are not departments of the government [but] are private corporations in which the government has an interest."); *Comm. for Monetary Reform v. Bd. of Governors of the Fed. Reserve Sys.*, 766 F.2d 538, 540 (D.C. Cir. 1985) (identifying the Federal Reserve Banks as "private corporations" with ownership of their individual stock); *Riegle v. Fed. Open Market Comm.*, 656 F.2d 873, 875 (D.C. Cir. 1981) (same); *Lewis v. United States*, 680 F.2d 1239, 1241-1242 (9th Cir. 1982) (holding that "the [Federal] Reserve Banks are not federal instrumentalities for purposes of the FTCA, but are independent, privately owned and locally controlled corporations"); *Hubbard v. Fed. Reserve Bank of Atlanta*, 1996 WL 551496, at *1 (E.D.La. Sept. 26, 1996) ("Federal Reserve Banks are independent corporations owned by commercial banks in their geographic regions . . . [and] should not be considered a federal agency."); *Melcher v. Fed. Open Market Comm.*, 644 F. Supp. 510, 518 (D.D.C. 1986) (describing the Federal Reserve Banks as "private corporations whose stock is owned by the member commercial banks within their districts"); *Lee Constr. Co., Inc. v. Fed. Reserve Bank of Richmond* 558 F. Supp. 165, 176 (D.Md. 1982) (same).

Other courts have applied the reasoning of the EEOC in contexts similar to that presently facing the Court. In *Katsiavelos v. Fed. Reserve Bank of Chicago*, 859

F.Supp. 1183 (N.D.Ill. 1994), an employee brought a handicap employment discrimination claim under federal law against the Federal Reserve Bank of Chicago. The court found that the Federal Reserve Bank was a private employer and not an executive agency, and therefore did not fit within the confines of the Federal Rehabilitation Act. *Id.* at 1185. In reaching this decision, the District Court relied on the aforementioned EEOC findings, stating that it "agrees with the analysis of the EEOC and adapts its reasoning." *Id.* In a subsequent opinion in the same case, the Illinois District Court addressed the issue of whether the Federal Reserve Bank was subject to suit under the Illinois Human Rights Act for alleged retaliation based on plaintiff's handicap. *Katsiavelos v. Fed. Reserve Bank of Chicago,* 1994 WL 721192 (N.D. Ill. Dec. 28, 1994). Citing the EEOC *Enforcement Guidance,* the Court hold that the Federal Reserve Bank was a private employer subject to *state* anti-discrimination statutes. *Id. at* *4. *See also Sheehan v. Anderson,* 2000 WL 288116, at *5 (E.D. Pa, 2000) ("for purposes of employment issues, the [Federal] Reserve Bank is a private employer"); *White v. Fed, Reserve Bank,* 660 N.E.2d 493, 496 (Ohio Ct. App. 1995) (upon discussing the EEOC Enforcement Guidelines and *Katsiavelos,* stating that "the view that the Federal Reserve Bank should be treated as a private employer for purposes of all discrimination claims is compelling.")

The EEOC interpretation and judgment, though not binding on the Court serves as a valuable source of guidance. *Mentor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 65 (1986); *Griggs v. Duke Power Co.,* 401 U.S, 424, 433-34 (1971); *Sheridan v. DuPont,* 100 F.3d 1061, 1068 (3d Cir. 1996). Its analysis and discussion of the Federal Reserve Bank with respect to the classification of the Federal Reserve Bank under federal discrimination

statutes can be and has been applied to the state employment issues at bar. This Court adopts the sound reasoning set forth in the EEOC *Enforcement Guidance* and the *Katsiavelos* line of decisions, and concludes that the Federal Reserve Bank is not immune from Plaintiff's state law claims.

It is true that the Federal Reserve Bank has been characterized as a federal instrumentality in certain situations, such as in the context of taxation, federal bribery statutes, and the Service Contract Act. *See Lewis*, 680 F.2d at 1242-43 (listing such cases); *Enforcement Guidance*, 1993 WL 452695, at -5-6. As such, Defendants refer to *Fed. Reserve Bank of St. Louis v. Metrocentre Improvement Dist.*, 657 F.2d 183 (8th Cir. 1981) and *Fed. Reserve Bank of Boston v. Comm'r of Corps. and Taxation*, 499 F.2d 60 (1st Cir. 1974) to support their contention that the Federal Reserve Bank should be designated a federal instrumentality in the case at bar. These cited cases have only limited force, however, because they deal specifically with the issue of the state taxation of Federal Reserve Banks and do not discuss employment claims, a distinction that courts have found significant. *See Lewis*, 680 F.2d at 1242 (finding that *Metrocentre* and *Fed. Reserve Bank of Boston* are limited to instances of state taxation and not applicable under the Federal Tort Claims Act); *Enforcement Guidance*, 1993 WL 452695, at *5 (citing to *Metrocentre* and *Fed. Reserve Bank of Boston* to support its position that "it is well established that the Federal Reserve Banks are federal instrumentalities for purposes of immunity from state taxation").

In *Metrocentre*, the Eighth Circuit decided whether the Federal Reserve Bank was a government instrumentality or agency "for purposes of tax immunity." 657 F.2d at 185. The Court stated that "[i]t is a well-established doc-

trine that federal agencies or instrumentalities are immune from special assessments by state and local governments unless waived by [C]ongress." *Id.* In *Fed. Reserve Bank of Boston,* the First Circuit addressed the question of whether the Federal Reserve Bank could sue in federal court for a declaration concerning the legality of a Massachusetts sales tax which exempted the United States and its agencies, but was levied against the Bank. 499 F.2d at 60. In reaching their decisions, both courts considered the important fiscal role of the Federal Reserve Banks and the impact that taxation would have on them. *See Metrocentre* 657 F.2d at 186 (noting that the Federal Reserve Bank serves important fiscal functions and is therefore a federal instrumentality immune from state and local taxation); *Fed. Reserve Bank of Boston,* 499 F.2d at 62. (finding that as "predominately fiscal arms of the federal government" the Banks are federal instrumentalities). If the case at bar involved state taxation of the Federal Reserve Bank, then this Court would be more inclined to accept the reasoning of those cases cited by Defendant. However, this case involves employment claims under state law and, therefore, the fiscal context underlying the conclusions in *Metrocentre* and *Fed. Reserve Bank of Boston* do not apply.[1]

The Defendants also direct the Court's attention to two Supreme Court decisions, *Goodyear v. Miller,* 486 U.S. 174 (1988) and *Hancock v. Train,* 426 U.S. 167 (1976) in defense of their argument. In *Goodyear,* the issue presented was whether a "private contractor operating a

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[1] Additional support for the distinction between the application of taxation and discrimination laws to the Federal Reserve Bank is found in 12 U.S.C. § 531, which explicitly immunizes banks from state and local taxation. No such statutory grant of immunity exists for cases of discrimination and retaliation.

federally owned nuclear productions facility [is subject] to a state-law workers' compensation provision." 486 U.S. at 176. The court stated that although "[a]ctivities of federal installations are shielded by the supremacy clause from direct regulation unless congress provides clear and unambiguous authorization for such regulation" a state workers' compensation provision was an authorized "incidental regulation" and did not run afoul of the Supremacy Clause. *Id.* at 180, 186. The issue in *Hancock* was whether a state, under a federally approved implementation plan, could require federally owned or operated installations to secure an air contamination permit. 426 U.S. 167, 168 (1976). In finding the installations not subject to regulation, the Supreme Court asserted that state regulation of federally owned or operated installations, instrumentalities, property, and activities would only be permitted upon the clear expression of Congress. *Id.* at 178-179.

Neither *Goodyear* nor *Hancock* requires the Court to find that the Federal Reserve Bank is immune from suit in this case. Those cases involved violations of qualitatively different state provisions, and as power plants and military installations, the entities were very different in form and function from the Federal Reserve Bank. Moreover, the facilities in *Goodyear* and *Hancock* were federally owned or operated, in marked contrast to the Federal Reserve Bank, which is privately owned and operated. *See Goodyear,* 486 U.S. at 176; *Hancock,* 426 U.S. at 168, 174. The *Goodyear* court acknowledged the "fundamental distinction between state regulation of private facilities and state regulation of federal facilities," only the latter of which applied in its case. 486 U.S. at 181 n.1.

Because the EEOC *Enforcement Guidance* and *Katsiavelos* line of decisions are most applicable to the case

at bar, and as the case law by and large rejects the notion of immunity of Federal Reserve Banks from state employment laws, this Court concludes that the Federal Reserve Bank is *not* immune from Plaintiff's state law claims.

B. *Preemption of State Law*

Defendants also assert a lack of subject matter jurisdiction because of the alleged federal preemption of state law. The goal of preemption analysis is to determine the intent of Congress. *Schneidewind v. ANR Pipeline Co,* 485 U.S. 293, 299 (1988). It is well established that state law may be preempted by federal law in three situations:

> First, Congress can define explicitly the extent to which its enactments preempt state law. . . . Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively [field preemption]. . . . Finally, state law is pre-empted to the extent that it actually conflicts with federal law.

English v. Gen. Elec. Co, 496 U.S. 72, 78-79 (1990) (citations omitted). *See also Abdullah v. Am. Airlines,* 181 F.3d 363, 367 (3d Cir. 1999); *Nat'l State Bank v. Long,* 630 F.2d 981, 985-986 (3d Cir. 1980). "Explicit preemption" is not at issue in this case as Defendants do not contend that Plaintiff's state law claims are expressly preempted by Federal law. However, Defendants claim both "field preemption" and "conflict preemption," each of which will be addressed separately.

1. *Field Preemption*

Defendants assert "field preemption" and argue that Congress has created a regulatory scheme which prevents the enforcement of state employment laws against the Federal Reserve Bank. Field preemption analysis starts with the presumption that Congress did not intend to supplant state law. *Building and Constr. Trades Council v. Assoc. Builders and Contractors,* 507 U.S. 218, 224 (1993). Therefore, the Defendants, as the party asserting preemption, face a heavy burden of proof. *Palladino ex. rel. United States v. VNA of Southern N.J., Inc.,* 68 F. Supp 2d 455, 465 (D.N.J. 1999). One can infer congressional intent to occupy a given field with federal law from a regulatory scheme that is either " 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an [a]ct of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.' " *English,* 496 U.S. at 79 (quoting *Rice v Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)). *See also Abdullah,* 181 F.3d at 367; *Long,* 630 F.2d at 985. If the field is an area that has been traditionally occupied by states, the intent of Congress to preempt state law must be clearly apparent. *English,* 496 U.S. at 79.

Defendants offer a litany of federal statutes and regulations to support their claim that Congress has occupied the field of employment law involving the Federal Reserve Bank, including various provisions in the Federal Reserve Act, the Federal Reserve Reform Act of 1977, the Federal Deposit Insurance Act, certain federal regulations, and various policy statements and guidelines from the Board of Governors. The Court does not believe that Defendants' heavy burden has been met

through their cursory enumeration of these statutes and limited discussion of their allegedly "field-occupying" nature. Defendants fail to convincingly explain how these statutes interact to demonstrate that Congress intended to prevent state law from functioning. *Cf. Abdullah,* 181 F.3d at 376 ("Because we find Congress's intent to regulate interstate and international air safety to be unambiguous, we hold that state and territorial standards of care in aviation safety are federally preempted"). Some of the statutes and regulations identified are not even related to discriminatory employment practices. The fact that federal laws regulate certain bank functions is not the equivalent of a pervasive and comprehensive statutory scheme that preempts state employment discrimination and retaliation laws. *See Palladino,* 68 F. Supp 2d at 467; *Abdullah,* 181 F.3d at 367. Overall, the evidence presented does not convince this Court that the federal interest in employment regulation is so dominant over the interest of the state to preclude enforcement of state laws. For these reasons, Plaintiff's state law claims are *not* foreclosed under the theory of field preemption.

2. *Conflict of State and Federal Law*

Although the doctrine of field preemption does not apply, it is still possible that the Court lacks subject matter jurisdiction due to an actual conflict between Plaintiff's state law claims and federal law. In making this determination, the Court is aware that in addition to circumstances that create an explicit conflict, preemption will be found in situations where the tension between state and federal law makes it impossible for a party to adhere to ~~both, or where~~ the state law is an obstacle to the execution and fulfillment of Congressional objectives and purposes. *English,* 496 U.S. at 79; *Long,* 630

F.2d at 985-986. In the case of Federal Reserve Banks, this may include situations in which the state law frustrates the reasons for the Bank's creation or prevents the Bank from fulfilling its duties. *See Long*, 630 F.2d at 987. Defendants' arguments that a federal-state conflict exists in the present case, each of which is addressed below, are ultimately unavailing.

a. *Federal Reserve Act*

Defendants argue that Plaintiff's employment claims are preempted because they are in direct conflict with the "at pleasure" language found in the Federal Reserve Act ("FRA"), 12 U.S.C. § 341(Fifth), and thereby frustrates its purpose. 12 U.S.C. § 341(Fifth) grants every Federal Reserve Bank the power to "appoint by its board of directors a president, vice presidents, and such officers and employees as are not otherwise provided for in this chapter, to define their duties, require bonds for them and fix the penalty thereof, and *to dismiss at pleasure such officers or employees*," (emphasis added). Despite some disagreement among the courts as to the meaning and precise effect of this provision, the Court finds that the "at pleasure" language does not preempt state employment discrimination and whistleblower claims.

Some courts have found that the "at pleasure language" in the FRA conflicts with, and thereby preempts, all state employment claims. For example, in *Leon v. Federal Reserve Bank of Chicago*, 823 F.2d 928, 929-930 (6th Cir. 1987), an employee of the Federal Reserve Bank brought suit against the Bank under a state employment law and claimed that she was fired because of her nationality and race, in denying plaintiff's claim, the Sixth Circuit ruled that § 341 of the FRA allows the Bank to dismiss employees "at pleasure" and that the provision therefore 'preempts any state employment

right to the contrary." *Id.* at 931. Other decisions have relied on the reasoning of *Leon* to reach similar conclusions. Most recently, in *Arrow v. Federal Reserve Bank of St. Louis,* 358 F.3d 392, 393 (6th Cir. 2004), the plaintiff alleged that her employer, the Federal Reserve Bank, discriminated and retaliated against her. Because its decision was "controlled" by *Leon,* the *Arrow* court likewise found that the "at pleasure" language in the FRA preempted plaintiff's state law claims. *Id. See also Kispert v. Federal Home Loan Bank of Cincinnati,* 778 F. Supp. 950, 953 (S.D.Ohio 1991) (applying the reasoning of *Leon* to conclude that the "at pleasure" language in the Federal Home Loan Bank Act preempted Bank employee's state law claims); *Aalgaard v. Merchants National Bank,* 224 Cal. App.3d 674, 692-693 (1990) (applying the reasoning of *Leon* to conclude that the "at pleasure" language in the National Bank Act preempted Bank employee's state law claims).

At the same time, numerous courts have found that the language of the FRA *does not* prevent Federal Reserve Bank employees from bringing state law employment claims against the Bank. For example, in *Moodie v. Fed. Reserve Bank of New York,* 831 F. Supp. 333, 334 (S.D.N.Y. 1993), an employee sued the Federal Reserve Bank for discrimination under the state Human Rights Law. The District Court of New York explicitly rejected the outcome in *Leon,* pointing out that *Leon* failed to provide a sufficient rationale for its broad. holding. *Id.* at 33. *See also Katsiavelos v. Fed. Reserve Bank of Chicago,* 1995 WL 103308, at *2 (N.D. Ill. Mar. 3, 1995) (criticizing *Leon* on the same basis). The *Moodie* court found that the "at pleasure" language of the FRA established an "at will" employment relationship which only prevented the employee from asserting *contractual* rights against the Federal Reserve Bank. *Moodie,* 831 F. Supp. at 336-337.

However, as the plaintiff in that case did not raise a contract claim, and nothing in the language of the statute prevented the employee from asserting his state discrimination claim, the court held that the plaintiffs claim was not preempted by the FRA. *Id.* This decision typifies the reasoning of the courts that have reached similar conclusions. *See Sheehan v. Anderson,* 2000 WL 288116, at *5 (E-D. Pa, Mar. 17, 2000) (finding that the language in the FRA preempts contractual claims such as breach of contract, breach of duty of good faith and fair dealing and tortious interference with contract); *Katsiavelos,* 1995 WL 103308, at *3-4 (holding that "at pleasure" in the FRA is analogous to "at will" language, protecting only contractual employment rights and "the right to be free from discrimination is not a contractual right"); *White v. Fed. Reserve Bank,* 660 N.E.2d 493, 496 (Ohio Ct. App. 1995) (finding no conflict between state and federal law because "at pleasure" is an expression of "at will" employment and a violation of the state anti-discrimination statute is an exception to the at will employment situation); *Mueller v. First National Bank of Ouad Cities,* 797 F.Supp. 656, 663 (C.D.Ill. 1992) (finding the "at pleasure" language of the National Bank Act created an "at will" employment relationship preventing only contractual employment claims); *Booth v. Old National Bank,* 900 F.Supp. 836, 843 (N.D.W.Va. 1995) (finding that under the National Bank Act an employer is shielded from a breach of contract claim, but not from a retaliatory discharge claim). *Cf. Mele v. Fed. Reserve Bank of New York,* 2004 U.S. App. Lexis 3491, at *7-9 (3d Cir. Nov. 18, 2004) (denying plaintiff's various claims because the FRA precludes enforcement of an employment contract against the Federal Reserve Bank).

Having reviewed the relevant jurisprudence, the Court finds the logic and analysis in the *Moodie* line of deci-

sions particularly persuasive on this issue. Accordingly, the Court concludes that the "at pleasure" language in the FRA establishes an "at will" employment situation that preempts employment contract claims. This result is in full accordance with the Third Circuit's recent pronouncement that the "Federal Reserve Act precludes enforcement against a Federal Reserve Bank of an *employment contract* that would compromise its statutory power to dismiss at pleasure." *Mele*, 2004 Lexis at *7-9 (emphasis added). However, the right to be free from discrimination and retaliation are important state concerns protected by statute and do not derive from any contractual rights created in the employer-employee relationship. CEPA and the LAD do not make it impossible for the Federal Reserve Bank to adhere to both state and federal law and do not interfere with the realization of the purpose and objectives of the FRA. Therefore, Plaintiff's state employment claims are not preempted under this conflict theory.

b. *Americans with Disabilities Act*

Defendants also assert that the LAD conflicts with the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et. seq.*, and is therefore preempted. Specifically, they argue that a greater range of impairments are protected under the term "handicapped" in the LAD then under the term "disability" in the ADA. They also contend that there is a conflict because the LAD provides for individual liability while the ADA does not.

The term "handicapped" is defined broadly under the LAD.[2] In contrast, under the ADA, a "disability" is

[2] Until recently, the statutory definition of "handicapped" under the LAD was

> suffering from physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect

defined as "a physical or mental impairment that substantially limits one or more of the major life activities." 42 U.S.C. § 12102(2)(A). As recognized by other courts, the term "handicapped" under the LAD and the term "disability" under the ADA differ considerably in their scope and coverage. Unlike the term "disability" in the ADA, the LAD's definition is more comprehensive and does not require restriction of a major life activity. *See Failla v. City of Passaic,* 146 F.3d 149, 154 (3d Cir. 1998); *Soules v. Mount Holiness Memorial Park,* 354 N.J.Super. 569, 574 (App.Div. 2002). Moreover, the ADA applies only to persons suffering from severe and "extremely limiting" impairments whereas the LAD warrants a liberal construction and is not limited to such considerable impairments. *Marinelli v. City of Erie,* 216 F.3d 354, 362 (3d Cir. 2000); *Anderson v. Exxon Co., U.S.A.,* 89 N.J. 483, 492 (1982); *Soules,* 354 N.J.Super. at 575.

> or illness including epilepsy, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or from any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Handicapped shall also mean suffering from AIDS or HIV infection.

N.J.S.A. § 10:5-5(q).

The language of this section was recently amended and "handicapped" was replaced by the term "disability." *See* Law Against Discrimination, P.L. 1945 ch. 169 § 10:5-5, 2003 N.J. Sess. Law Serv. 180 (West). This does not change this Court's analysis because the distinction between the breadth of protections between the LAD and the ADA remains the same.

Though the protection offered under each statute may be different, the difference does not amount to a conflict under preemption doctrine. The objectives of both statutes, to prohibit discrimination on the basis of handicap or disability, are identical. *See Anderson,* 89 N.J. at 492 ("The paramount purpose of the [LAD] is to secure to handicapped individuals full and equal access to society"); 42 U.S.C. § 12101(b)(1) (The purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."). Accordingly, the purpose of the federal statute is not frustrated by any additional protection that may be provided by the LAD.

This reasoning also applies to the apparent differences in the availability of individual liability. *See Failla,* 146 F.3d at 153 (stating that § 12(c) of the LAD provides for individual employee liability for aiding and abetting); *Sunkett v. Misci,* 183 F.Supp. 2d 691, 718 (D.N.J. 2002) (same); *Koslow v. Commonwealth of Pa.,* 302 F.3d 161, 178 (3d Cir. 2002) (concluding that the ADA does not allow for individual liability); *EEOC v. AIC Sec. Investigations, Ltd.,* 55 F.3d 1276, 1280-1281 n.4 (7th Cir. 1995) (same). The distinctions between the LAD and the ADA simply demonstrate that New Jersey in this instance has decided to offer greater protection to the victims of discrimination, a fact that does not mean that the state statute is preempted. *See e.g., English,* 496 U.S. at 89 ("Ordinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law.") (citing *California v. ARC America Corp.,* 490 U.S. 93, 105 (1989)). As the state and federal statutes can "peaceably coexist," there is no reason to believe that Congress felt the Federal Reserve Bank could not adhere to the requirements

of both statutes while fulfilling its statutorily-mandated duties.[3]

The complementary nature of the federal ADA and state law LAD has been recognized in others decisions. In reviewing a discriminatory employment termination claim under both the LAD and ADA, the Third Circuit has noted, for example, that the LAD and ADA claims were "governed by the same standards" and that under both statutes "courts apply the same burden-shifting framework." *Lawrence v. Nat'l Westminster Bank*, 98 F.3d 61, 70 (3d Cir. 1996). Also, in *Griglotti v. Ortho Pharm. Corp.*, 118 N.J. 89, 97 (1990) the New Jersey Supreme Court stated that "[i]n a variety of contexts involving allegations of unlawful discrimination, this Court has looked to federal law as a key source of interpretive authority. The substantive and procedural standards that we have developed under the State's LAD have been markedly influenced by the federal experience." Because any textual variations between the LAD and the ADA do not constitute preemptive conflicts, the Court rejects Defendants' argument on this issue.

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[3] Additional support for this assertion can be inferred from the Third Circuit's decision in *Failla* where the plaintiff brought discrimination claims under both the LAD and the ADA against the city, the police department, and the police chief. 146 F.3d at 152. With respect to claims brought against the city and police department, the jury determined that the plaintiff was not "disabled" under the ADA but was "handicapped" under the LAD. *Id.* On appeal, the defendants challenged the jury's finding as inconsistent. *Id.* at 153. In affirming the judgment, the court acknowledged that in light of the different standards between the two statutes, the jury's finding was *not* inconsistent. *Id.* at 154. The fact that both LAD and ADA claims were accepted, adjudicated, and upheld without the court indicating that it might lack subject matter jurisdiction due to conflict preemption is further evidence that these claims can be brought simultaneously.

c. *12 U.S.C. § 1831j*

Defendants also assert that CEPA, New Jersey's whistle-blower statute, conflicts with the federal whistleblower statute, 12 U.S.C. § 1831j, because CEPA protects a broader range of whistleblowing activities and allows for individual liability whereas Section 1831j does not. As to their scope of activities claim, Defendants fail to specifically identify language in the statutes that would create a conflict and therefore warrant preemption. 12 U.S.C. § 1831j(a)(2) protects employees of the Federal Reserve Bank from retaliation for reporting "information [about the employer] regarding any possible violation of any law or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." CEPA, New Jersey's whistleblower statute, proscribes retaliation against an employee that:

> a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer or another employer, with whom there is a business relationship, that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law; or
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> b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of a law, or a rule or regulation promulgated pursuant to law by the employer; or
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> c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:
>
> (1) is in violation of a law, or rule or regulation promulgated pursuant to law; or

(2) is fraudulent or criminal; or

(3) is incompatible with a. clear mandate of public policy concerning the public health, safety or welfare.

N.J.S.A. § 34:19-3.

Although there exist some differences in the language and scope of the statutes, both whistle-blower statutes share a common purpose of prohibiting retaliatory action where an employee reports a violation of law or regulation. *See e.g., Haley v. Retsinas,* 138 F.3d 1245, 1248-1249 (8th Cir. 1998) (stating that Section 1831j encourages reporting of illegal practices "without a fear of reprisal by [the] employer"); *Blackburn v. United Parcel Serv. Inc.*, 3 F. Supp. 2d 504, 512 (D.N.J. 1998) (CEPA was enacted to protect employees who report employer's harmful or illegal activity). Any differences in the availability of individual liability does not affect this common purpose or suggest that preemption is appropriate. The fact that CEPA allows for individual liability, *Palladino,* 68 F. Supp 2d at 474, and Section 1831j apparently does not, *Rouse v. Farmers State Bank,* 266 F. Supp. 1191, 1203-1204 (N.D.Iowa 1994), does not justify preemption. As already mentioned, state laws are not preempted simply because they provider greater protections then the federal law. *See Sandom v. Travelers Mortgage Servs., Inc.*, 752 F. Supp. 1240, 1245-1246 (D.N.J. 1990) (finding that CEPA was not preempted despite providing more remedies than Title VII); *Palladino,* 68 F. Supp 2d at 467 (finding that CEPA was not preempted by the False Claims Act, and asserting that a state law is not preempted if it provides stricter standards); *English,* 496 U.S. at 89-90 (1990) (finding that state tort law claim of intentional infliction of emotional distress was not preempted by federal Energy

Reorganization Act, and that state laws are not pre-empted because they impose greater liability then the federal law).

Allowing the extra protection that would arise from the combined application of both the state and federal whistle-blowing laws is likely to encourage the reporting of violative behavior and thus further the purpose of the federal law. *See, e.g., Palladino,* 68 F. Supp 2d at 467 ("Since Congress' intent [under the FCA] is to protect employees who report fraud, it seems more plausible that Congress would embrace a state law that provided whistleblowers additional protection, further encouraging the reporting of fraudulent acts"). For the reasons stated above, this Court finds that Plaintiff's CEPA claims do not conflict with Section 1831j. There is no reason to believe that the Federal Reserve Bank cannot adhere to the requirements of both the state and federal laws while simultaneously adhering to its fiscal duties.

C. *Failure to State a Claim*

Having found that Plaintiff's claims should not be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1), the Court must now address Defendants' allegations that Plaintiff's claims should be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. In deciding a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, all allegations in the complaint must be taken as true and viewed in the light most favorable to the plaintiff. *Gomez v. Toledo,* 446 U.S. 635, 636 n.3 (1980); *Robb v. Philadelphia,* 733 F.2d 274, 277 (3d Cir. 1984). Claims should be dismissed under F.R.C.P. 12(b)(6) only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle

him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Graves v. Lowery,* 117 F.3d 723, 726 (3d Cir. 1997). The issue is not whether Plaintiff "will ultimately prevail but whether she is entitled to offer evidence to support her claims." *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). In setting forth a valid claim, Plaintiff is required only to plead "a short and plain statement of the claim" demonstrating that she is entitled to relief that "will give the defendant fair notice of what the plaintiffs claim is and the grounds upon which it rests." Fed.R.Civ.P. 8(a)(2); *Lundy v. Adamar of New Jersey. Inc.,* 34 F.3d 1173, 1194 n.14 (3d Cir. 1994) (citing *Conley,* 355 U.S. at 47-48).

1. *Conscientious Employee Protection Act*

Defendants assert that Plaintiff's claims under CEPA should be dismissed as a matter of law. The Conscientious Employee Protection Act, N.J.S.A. 34:19-1 *et. seq.,* or "CEPA," was enacted to "protect employees who report illegal or unethical work-place activities" from retaliation by their employers. *Higgins v. Pascack Valley Hosp.,* 158 N.J. 404, 417 (1999) (quoting *Barratt v. Cushman & Wakefield,* 144 N.J. 120, 127 (1996)). CEPA prohibits an employer from taking "retaliatory action" against an employee who:

> a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer or another employer, with whom there is a business relationship, that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law; or
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> b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of a law, or a rule or reg-

> ulation promulgated pursuant to law by the employer; or
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> c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:
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> (1) is in violation of a law, or rule or regulation promulgated pursuant to law; or
>
> (2) is fraudulent or criminal; or
>
> (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare.

N.J.S.A. § 34:19-3.

Accordingly, to make out a prima facie claim under CEPA, Plaintiff must show: (1) that she reasonably believed her employer's conduct was violating either a law, a rule or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) that she performed a whistle-blowing activity recognized under CEPA; (3) an adverse employment action was taken against her[4]; and (4) a causal connection between the whistle-blowing activity and the adverse employment action. *Dzwonar v. McDevitt,* 177 N.J. 451, 462 (2003) (citing *Kolb v. Burns,* 320 N.J. Super. 467 (1999)); *Mehlman v. Mobil Oil Corp.,* 153 N.J. 163, 185-87 (1998).

Defendants claim that Plaintiff did not, at the time of articulating her concerns, have an objectively reasonable belief that her employer's conduct was impermissible but only alleged that she subjectively believed that wrongdoing had occurred. Moreover, Defendants argue

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[4] Actionable retaliatory acts under CEPA include "the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment." N.J.S.A. § 34:19-2(e).

that the activity on which Plaintiff "blew the whistle" is peculiar only to her and does not constitute that type of an activity the disclosure of which CEPA was meant to protect.

In *Mehlman*, 153 N.J. at 192 the court emphasized that the employee in a CEPA action must have an "objectively reasonable belief" that improper conduct had occurred. However, the employee is not required to have "specific knowledge of the precise source of public policy" as long as the court can identify the law or public policy that might have been violated by the challenged conduct. *McLelland v. Moore*, 343 N.J. Super. 589, 600 (App.Div. 2001). *See also Roach v. TRW, Inc.*, 164 N.J. 598, 610 (2000) ("[T]he Legislature did not intend to hamstring conscientious employees by requiring that they prove in all cases that their complaints involve violations of a defined public policy"). When a plaintiff brings a claim pursuant to N.J.S.A. § 34:19-3c, the trial court must therefore as a threshold matter determine "that there is a substantial nexus between the complained-of conduct and a law or public policy identified by the court or the plaintiff." *Dzwonar*, 177 N.J. at 464.

In this case, if the facts alleged are true, Plaintiff has asserted an objectively reasonable belief that improper conduct took place through the alteration of her time records and the failure of Defendants to properly pay her the overtime hours she worked. Under the New Jersey State Wage and Hour Law, covered employees must be paid for all hours worked, and increased pay for overtime is mandatory. *See* N.J.S.A. § 34.11-56a4; N.J.A.C. 12:56-6.1; N.J.A.C. 12:56-5.1. An employer must keep complete and accurate records of the times worked of its employees. N.J.A.C. 12:56-4.2. Furthermore, an employer who in any manner discriminates against an employee because such employee has made any complaint that he

has not been paid his proper wages is guilty of a disorderly persons offense and fined. N.J,A.C. 12:56-1.7. Similarly, under the federal Fair Labor Standards Act ("FLSA"), overtime pay is generally required for all hours worked beyond 40 hours per week. 29 U.S.C. § 207(a)(1). In addition, under the record-keeping provisions of the FLSA, 29 U.S.C. § 211, an employer must maintain accurate records of each employee's wages and hours.

Plaintiff's allegations are similar to those made in *Mosley v. Femina Fashions, Inc.*, 356 N.J. Super. 118 (App.Div. 2002), in which plaintiff brought a CEPA claims after complaining that the employer had changed her time card to reduce the number of hours worked and failed to pay her overtime. Although plaintiff's claim was dismissed on other grounds, the court noted that "[i]f plaintiff worked the hour, and the employer changed her time card to reflect she worked one hour less, this would be a violation of the law." *Id.* at 127. Whether or not Defendants activity in fact constitutes a violation of these laws or analogous statutes, need not be decided. What is important is that the Complaint has sufficiently alleged that Plaintiff possessed an objectively reasonable belief of illegal activity at her workplace. Moreover, Plaintiff's "objections" to the actions she believed were illegal, namely the alteration of her wages and failure to pay overtime, fits within the confines of CEPA. N.J.S.A. 34:19-3(c)(1). *See Roach,* 164 N.J. at 610 ("all laws and regulations are imbued with the public interest.") The fact that Plaintiff made these assertions in part for financial reasons does not take away from their whistle-blowing nature. If such a contention were accepted, no one could assert a CEPA claim upon being retaliated against for exposing such matters as an employer's failure to pay requisite wages or failure to

provide required benefits to its employees, which inherently affect an employee's own interest as well as that of the public at large.

In their motion to dismiss, Defendants also state that the Complaint has failed to allege facts sufficient to support a causal connection between the claimed whistle-blowing activity and the alleged retaliation. Plaintiffs alleged whistle-blowing activity occurred on August 23, 2001 whereas the alleged retaliation occurred when she was assigned to a "floater" position at the end of November 2001 and then terminated on July 31, 2002.[5] Between these dates, Defendants argue that the actual reason for her termination took place, namely Plaintiff's alleged failure to return to work at the end of her medical leave.

In considering the causation prong in this context, courts will examine the timing between the whistle-blowing and the adverse employment action. See *Kachmar v. SunGard Data Sys. Inc.*, 109 F.3d 173, 177 (3d Cir. 1997); *Watkins v. Nabisco Biscuit Co.*, 224 F.Supp. 2d 852, 871 (D.N.J. 2002). The "temporal proximity between an employee's termination and his protected activity may permit an inference of causation when the relatively short interval between the two is 'unusually

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[5] Defendants make the additional argument that being assigned to a floater position does not constitute an "adverse employment action" under CEPA for Plaintiff retained the same hours and salary both before and after the new assignment. First, the Court notes that Plaintiff was also terminated from her job, an employment action undoubtedly adverse. Second, Plaintiff's new position, although similar in many aspects, required her to undertake significantly more heavy lifting and gave her less time to eat at regular intervals, both aspects which allegedly aggravated Plaintiff's disabilities. At this juncture, the Court rejects the proposition that these allegations do not amount to a change in the "terms and conditions of employment" that is actionable under CEPA.

suggestive' of retaliation." *Schlichtig v. Inacom Corp.*, 271 F.Supp.2d 597, 612 (D.N.J. 2003). An employee may also demonstrate the requisite causality "by producing circumstantial evidence of 'ongoing antagonism' or 'retaliatory animus' in the intervening period between his protected activity and the adverse action." *Id.* A wide variety of evidence may be considered to infer causation as "the case law has set forth few limits on the type of evidence which might suffice to establish a prima facie showing of causation." *Hargrave v. County of Atlantic*, 262 F.Supp.2d 393, 425 (D.N.J. 2003). *See Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 281 (3d Cir. 2000) ("[W]e have been willing to explore the record in search of evidence, and our caselaw has set forth no limits on what we have been willing to consider"). Moreover, even if intervening activities occurred between the whistle-blowing and termination which provided additional reasons for her firing, to make out a prima facie case, Plaintiff "need not prove that his whistle-blowing activity was the only factor in the decision to fire him." *Donofry v. Autototc Sys., Inc.*, 350 N.J.Super. 276, 296 (App.Div. 2001).

The Court cannot, at this early stage in the litigation process, hold that Plaintiff is unable to prove facts that would support the requisite causal connection. In light of the liberal evidentiary standard for proving causation, the relatively short time period between the whistle-blowing activity and the retaliatory actions, and Plaintiff's allegations that she was told not to discuss the incident with others and that she may be forced out because she had started "trouble," these allegations are sufficient to withstand a motion to dismiss. To require more would run counter to the long-standing notion that only minimal pleading is required in federal courts..

2. *Law Against Discrimination*

Defendants also argue that Plaintiff has failed to state a claim with respect to allegations made under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, *et seq.* ("LAD"), and therefore that this portion of the Complaint should be dismissed. As a threshold matter, Defendants assert that Plaintiff has omitted an element of a LAD claim, that the employer sought someone else to perform the same work following Plaintiff's termination. It is true that in order to establish a prima facie case of handicap *discrimination* under the LAD in the employment context, the employee must prove, among other things, that post-termination, the employer searched for someone to perform the same work. *Jansen v. Food Circus Supermarkets, Inc.*, 110 N.J. 363, 382 (1988); *Mosley*, 356 N.J.Super. at 130. However, as Plaintiff notes, she is not making a discrimination claim under the LAD, but rather an *accommodation* claim, in that Defendants allegedly failed to accommodate her handicap. To prove a failure to accommodate claim. under the LAD, Plaintiff must prove she: (1) was handicapped, (2) was qualified to perform the essential functions of the job, with or without accommodation, and (3) suffered an adverse employment action because of the handicap. *Bosshard v. Hackensack Univ. Med. Ctr.*, 345 N.J.Super. 78, 91 (App.Div. 2001) (citing *Seidci v. Marina Assoc.* 315 N.J.Super. 451, 465-66 (Law Div. 1998)); *see also Dicino v. Aetna U.S. Healthcare*, 2003 WL 21501818, at *12 , (D.N.J. June 23, 2003). Because proof that the employer searched for someone to perform the same work is used "to allow an inference to be drawn of disparate treatment, the plaintiff need only establish it as to the discrimination claim, and not as to the reasonable accommodation claim." *Leshner v. McCollister's Transp. Sys.*, 113 F.Supp.2d 689, 692

(D.N.J. 2000). Defendants' argument on this ground is therefore misplaced.

Accepting the facts alleged as true, Plaintiff's allegations constitute an actionable failure to accommodate claim under the LAD. Plaintiff has alleged that she is handicapped within the broad statutory definition of the LAD. *DeJoy v. Comcast Cable Communications,* 968 F.Supp. 963 (D.N.J. 1997). Under N.J.S.A. 10:5-5(q), the term handicapped includes those who suffer from a physical disability, which would encompass Plaintiff's diabetes, neck and lower back injuries. In addition, it appears clear, and no assertion is made to the contrary, that Plaintiff possessed sufficient qualifications to perform her job as a currency verification operator and junior operator.

Moreover, contrary to Defendants' assertions, Plaintiff has set forth facts indicating that adverse employment action was taken against her because of her handicap, Plaintiff complaints to her supervisors that her transfer to a "floater" position was "killing her" brought no employer response. The exacerbation of her injuries because of this failure to accommodate her disability allegedly prevented Plaintiff from returning to work, thereby leading to her termination. This chain of events mirrors that which occurred in *Seiden,* 315 N.J.Super. 451 (Law Div. 1998). In *Seiden,* plaintiff casino dealer, who suffered from severe leg pain, filed a LAD failure-to accommodate action after his employment was terminated. Prior to his termination, Plaintiff had been transferred by his employer to a "swing shift" which did not allow him to deal from a tool or sit at a table for handicapped players. Examining these facts, the court noted that the "proofs are sufficient for a jury to find that plaintiff was unable to perform on the swing shift due to his disability and as a result he did not appear for

work and was fired. Thus, all three elements of the prima facie case have been meet." *Id.* at 467. As this case presents nearly identical allegations, adhering to the same logic, the Court likewise finds that Plaintiff's failure to accommodate claim should not he dismissed.

Plaintiff has also sufficiently pled her retaliation claim under the LAD. A retaliation claim under the LAD requires that Plaintiff prove: (1) that she engaged in a protected activity known to the employer; (2) that she was subjected to an adverse employment decision by the Defendant; and (3) that there was a causal link between the protected activity and the adverse employment decision. *Shepherd v. Hunterdon Developmental Ctr.*, 336 N.J.Super. 395, 418 (App.Div. 2001) *(rev'd on other grounds,* 174 N.J. 1 (2002)); *Hargrave,* 262 F.Supp.2d at 423.

Plaintiff has alleged that she was engaged in "protected activity" known to her employer. A formal letter of complaint to an employer or the EEOC is not the only acceptable form of "protected conduct." *DeJoy,* 958 F.Supp. at 988 (citing *Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 701 (3d Cir. 1995)). "Informal protests of discrimination to management may qualify as protected activity as well." *Id.* In the case at bar, Plaintiff told her supervisor that she felt she was "being prejudiced against." (Compl. ¶ 17). This was not a vague assertion of unfair treatment, but apparently arose after Plaintiff complained to Human Resources that her pay was lower than other operators with less seniority and that she had not received a six month pay raise which was standard for someone in her position. (*Id.*) Even if the Court ultimately finds that Defendants had not discriminated against Plaintiff, in *Drinkwater v. Union Carbide Corp.*, the Third Circuit recognized that it is the plaintiff's belief, not the merits of her claim, that determines

whether an employee's conduct is protected. 904 F.2d 853, 866 (3d Cir.) 990). *See* also *Marrero v. Camden County Bd. of Social Servs.*, 164 F.Supp.2d 455, 473 (D.N.J. 2001). In any event, Plaintiff s request for an accommodation for her disability also constitutes protected activity under the LAD. Altogether, Plaintiff has satisfactorily alleged that she was engaged in "protected activity."

Defendants also state that Plaintiff's retaliation claim under the LAD is barred because she has also filed a retaliation claim under CEPA. CEPA's waiver provision provides:

> [T]he institution of an action in accordance with this act shall be deemed a waiver of the rights and remedies available under any *other* contract, collective bargaining agreement, State law, rule or regulation or under the common law.

N.J.S.A. § 34:19-8.

"As an exception to the general remedial scheme of CEPA, the waiver provision must be construed narrowly." *Young v. Schering Corp.*, 141 N.J. 16, 29 (1995). It "does not apply to those causes of action that are substantially independent of the CEPA claim" but only "to those causes of actions that require a finding of retaliatory conduct that is actionable under CEPA." *Id.* A plaintiff can bring a claim in addition to the CEPA claim if it "do[es] not resemble the alleged CEPA violations and require[s] different proofs than those needed to substantiate the CEPA claim." *Kadetsky v. Egg Harbor Twp. Bd. of Educ.*, 82 F.Supp.2d 327, 341 (D.N.J. 2000). The same principles apply when a plaintiff brings claims under both CEPA and LAD. *See Bowen v. Parking Auth, of the City of Camden*, 2003 WL 22145814, at *24 (D.N.J. Sept. 18, 2003) ("[n]ot every NJLAD claim is

waived by a CEPA claim."); *Blakey v. Continental Airlines, Inc.*, 1995 WL 464477, at *2 (D,N.J. June 16, 1995) ("As long as Plaintiff's claims under CEPA and NJLAD derive from separate sets of facts, her CEPA and NJLAD claims can be simultaneously maintained").

The Court agrees that overlap exists between Plaintiff's retaliation claim under CEPA and her claim under LAD. However, the Court believes the two are sufficiently distinct to withstand a motion to dismiss and that only discovery will flesh out the contours of these claims so that a proper comparison can be made. The factual basis underlying these two claims are different. Plaintiff's CEPA claim derives from her whistle-blowing activity regarding the failure to pay overtime and the alteration of time records. Plaintiff's LAD claim stems from her seeking accommodation and for complaining about the discriminatory treatment she received with respect to her salary. Although it is possible that part of Plaintiff LAD claim, that related to her comments of "being prejudiced against," could have instead been brought under CEPA, the accommodation request could not be construed as a whistle-blowing activity.

At this early stage in litigation, it would he unfair to make Plaintiff choose between remedies. "[B]efore electing remedies, a plaintiff should have an opportunity to complete discovery. Only after gaining access to all the facts, will a plaintiff be in a position to make a knowing and meaningful election." *Maw v. Advanced Clinical Communications, Inc.*, 359 N.J. Super. 420, 441 (App.Div. 2003) (allowing plaintiff to maintain both common-law claim for wrongful discharge and CEPA claim because discovery not completed). Therefore, Defendants' motion. to dismiss on waiver grounds is denied.

3. *Individual Liability*

Defendants concede that both CEPA and the LAD allow for individual liability. However, they assert that Plaintiff has failed to state viable claims of individual liability under CEPA and the LAD. Particularly with respect to CEPA, Defendants argue that Plaintiff has failed to allege any violative action taken by Defendants Henry, Hope, and Ramos. However, the Court's review of the Complaint establishes that these actions have been sufficiently pled.

As previously discussed, individual liability may be imposed under CEPA. *See Espinosa,* 80 F.Supp.2d at 305-06 (individual defendants may be held individually liable under CEPA); *Palladino,* 68 F.Supp.2d at 474 ("the imposition of individual liability for offending conduct furthers CEPA's protective and remedial purposes"). Under CEPA, an "employer" is liable for retaliation against an employee, a term that includes "any individual, partnership, association, corporation or any person or group of persons acting directly or indirectly on behalf of or in the interest of an employer with the employer's consent." N.J.S.A. 34:19-3; N.J.S.A. 34:19-2a. "A fair reading of the statute therefore makes both the employer and the employee subject to CEPA's prohibitions." *Maw*, 359 N.J. Super. at 440-41.

Contrary to Defendants' assertions, the Complaint includes allegations that all of the Defendants acted either "directly or indirectly" in this matter. Plaintiff met with Defendants Hope and Ramos to discuss the withheld overtime pay and time sheet alteration. She also met separately with Defendant Henry and stated that she was "being prejudiced against." A number of allegations encompass these particular Defendants by reference to Defendants generally. This includes assertions that Defendants knew of Plaintiffs prior injuries and that the

reassignment would cause her harm, assigned her to the "floater" position, and ultimately terminated her in retaliation for her conduct. None of the Defendants can be dismissed at this time from the CEPA claim.

Defendants also argue that Plaintiff has failed to state a claim of individual liability under the LAD. Under the LAD, it is unlawful for "any person, whether an employer or employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under [the LAD], or to attempt to do so." N.J.S.A. 10:5-12(e). An employee can be held liable for "aiding and abetting" a violation of the NJLAD only when it is shown that he "knowingly [gave] substantial assistance or encouragement to the unlawful conduct of his employer." *Failla*, 146 F.3d at 158; *see also Gardenhire v. New Jersey Mfs. Ins. Co.*, 333 N.J.Super. 219, 228, 754 A.2d 1244 (Law Div. 2000) (adopting the Third Circuit's interpretation of N.J.S.A. 10:5-12(e)).[6] Moreover, "only employees who have delegated some degree of supervisory authority can be held personally liable under the [LAD] as 'aiders and abettors.' " *Hargrave*, 262 F.Supp.2d at 434 (referring to *Hurley*, 174 F.3d at 129). A supervisory employee's omissions, acquiescence, passivity or other failure to act will not support a LAD aiding and abetting claim. *Tyson v. CIGNA Corp.*, 918 F.Supp. 836 at 837, 841 (D.N.J. 1996).

Defendants argue that the individuals cannot be held liable as aiders and abettors because the employer has

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[6] The Third Circuit has identified six factors which may be relevant to the determination of whether a defendant has provided "substantial assistance or encouragement": (1) the nature of the act encouraged; (2) the amount of assistance given by the defendant; (3) his presence or absence at the time of the tort; (4) his relation to the other; (5) his state of mind; and (6) the duration of the assistance provided. *See Hurley*, 174 F.3d at 127, n. 27.

not engaged in unlawful conduct. This argument must be rejected at this time because the liability of the employer has not yet been determined. As to the merits, the Court cannot tell from the scant record thus far whether the individual Defendants have offered "substantial assistance and encouragement" to the unlawful actions. It is certainly possible that all of the Defendants participated sufficiently to the actions in dispute to be found liable under the LAD.

The Court reiterates that at this stage in the litigation, the Plaintiff is not required to provide detailed facts upon which her claim is based. All that is required is "a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Lundy,* 34 F.3d at 1194 n.14. Taking the pleaded assertions in the light most favorable to Plaintiff, it simply does not "appear[ ] beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Conley,* 355 U.S. at 45-46. Plaintiff has made sufficient allegations to put the Defendants on notice to both the principal elements of her state law claims as well as the facts supporting individual liability. Accordingly, the Court concludes that Plaintiff has satisfied its basic pleading requirements at this time. The motion to dismiss for failure to state a claim is denied.

CONCLUSION

This matter, having come before the Court upon Defendants' motion to dismiss; and the Court having considered the parties' submissions; and for the reasons expressed in the Opinion of today's date,

IT IS this 30th day of March, 2004, hereby

ORDERED that Defendants' motion to dismiss for lack of *subject* matter jurisdiction is DENIED; and it is

FURTHER ORDERED that Defendants' motion to dismiss for failure to state a claim is DENIED.

It is so ordered.

Dated: March 30th, 2004

/s/ JOSE L. LINARES
JOSE L. LINARES
UNITED STATES DISTRICT JUDGE

FILED
DEC 7 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 06-634

IN THE

Supreme Court of the United States

MAUREEN FASANO,

Petitioner,

v.

FEDERAL RESERVE BANK OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether a writ of certiorari should be granted where the Third Circuit correctly found that federal law preempts the application of two New Jersey employment statutes to the Federal Reserve Bank of New York, because these New Jersey statutes impose far greater substantive and procedural rights and remedies than corresponding federal law, and thereby frustrate Congressional intent to provide Federal Reserve Banks with broad employment discretion in the performance of their federally mandated central banking functions.

2. Whether a writ of certiorari should be granted where the Third Circuit Opinion is in harmony with this Court's preemption jurisprudence and does not conflict with any decision of a Court of Appeals or state court of last resort.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Federal Reserve Bank of New York ("New York Fed") is a corporation chartered under the laws of the United States pursuant to the Federal Reserve Act of 1913, 12 U.S.C. § 221 *et seq.* The New York Fed, a corporate instrumentality of the United States government, has no parent company, nor does it have any subsidiaries or affiliates. Stock of the New York Fed is owned by member commercial banks within the Second Federal Reserve District. The stockholders, however, do not control the New York Fed. Stock of a Federal Reserve Bank is acquired because its ownership is a condition of membership in the Federal Reserve System. Federal Reserve Bank stockholders do not possess a residual equity interest in Reserve Bank assets. That residual interest remains always with the United States.

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SUMMARY OF REASONS TO DENY THE PETITION

The Supremacy Clause mandates that federal law "shall be the Supreme law of the Land . . . [the] Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. This case concerns whether the Supremacy Clause permits a plaintiff to bring claims against a Federal Reserve Bank and its employees under state employment laws that provide greater substantive and procedural rights and remedies than the corresponding federal laws. The Third Circuit, like every other Court of Appeals that has considered this issue, has found that the "dismiss at pleasure" provision of the Federal Reserve Act, 12 U.S.C. § 341 (Fifth) ("Section 341 (Fifth)"), preempts the application of such laws to Federal Reserve Banks and their employees.

Petitioner has presented no compelling reasons why her Petition for a Writ of Certiorari ("Petition" or "Pet.") should be granted. First, Petitioner fails to demonstrate that the Third Circuit's August 3, 2006 Opinion and Order ("Third Circuit Opinion") conflicts with a decision of this Court, or that the Third Circuit decided an important federal question that should be settled by this Court. Second, Petitioner fails to demonstrate that the Third Circuit Opinion conflicts with a decision of another Court of Appeals or a state court of last resort.

Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

I. THE PARTIES

A. The New York Fed

The New York Fed is one of twelve Federal Reserve Banks chartered pursuant to the Federal Reserve Act of 1913 ("FRA"), 12 U.S.C. § 221 *et seq.* Congress created the Federal Reserve to serve as the central bank of the United States. The Federal Reserve consists of the twelve Federal Reserve Banks, the Board of Governors of the Federal Reserve System ("Board of Governors"), and the Federal Open Market Committee ("FOMC"). The Board of Governors, which consists of seven members nominated by the President and confirmed by the Senate, *see* 12 U.S.C. § 241, and the FOMC are both independent agencies of the United States government. The New York Fed, together with the other eleven Federal Reserve Banks, constitutes the operational component of the nation's central bank.

Federal law sets forth the power and authority of the Federal Reserve Banks. Through its employees, each Federal Reserve Bank, including the New York Fed, performs a myriad of central banking functions prescribed by federal law that are designed to develop, implement and foster the monetary and fiscal objectives of the United States to serve the public interest. The functions performed by Federal Reserve Banks require a high degree of uniformity in order to ensure consistent application of national policy.

First, Federal Reserve Banks issue and distribute the nation's legal tender, Federal Reserve Notes. *See* 12 U.S.C. § 341 (Eighth). This function is particularly relevant, because

Petitioner worked in the New York Fed's cash issuance and processing operation. (*See* Pet. at 6.)

Second, Federal Reserve Banks act as the banker for the United States government. As such, the New York Fed is a depository of U.S. government funds. *See* 12 U.S.C. § 391. The New York Fed acts as fiscal agent for the United States Department of the Treasury ("Treasury"), such as by issuing and redeeming U.S. government securities. *See id.* The New York Fed also serves as the international operating arm of the Federal Reserve, maintaining accounts for foreign central banks and conducting certain investment and trading activities on their behalf.

Third, the Federal Reserve establishes U.S. monetary policy through the FOMC, whose mandate is to direct and regulate the execution of that policy to serve the goals of "maximum employment, stable prices, and moderate long-term interest rates." 12 U.S.C. § 225a. The New York Fed executes federal monetary policy as contemplated by federal law through "open-market operations," where the New York Fed purchases and sells government securities. *See* 12 U.S.C. § 263(b). The money that is paid or received as a result of these operations respectively restricts or expands the nation's money supply.

Fourth, Federal Reserve Banks carry out federal banking policy and ensure the safety and soundness of the nation's banking system. Federal Reserve Banks supervise various financial institutions within their regional Federal Reserve Districts, pursuant to power delegated by the Board of Governors. *See* 12 U.S.C. §§ 248(k), 325, 338, 625, 1844(c), 3105; 12 C.F.R. § 265.2.

Fifth, federal law sets uniform reserve requirements to ensure the solvency of depository institutions, and requires that these reserves are to be held by the Federal Reserve Banks. *See* 12 U.S.C. § 461; 12 C.F.R. pt. 204. In addition, federal law provides for Federal Reserve Banks to maintain a liquid banking system by acting as lender of last resort through Discount Window loans. *See* 12 U.S.C. §§ 343-52, 461(b)(7); 12 C.F.R. pt. 201.

Pursuant to federal law, each Federal Reserve Bank must operate within the territorial boundaries of its Federal Reserve District. Consequently, Federal Reserve Banks do not have the choice of where they do business, and thus to which state laws they would be subject. Each of the twelve Federal Reserve Districts spans multiple states, and all but one span multiple federal judicial circuits. *See* 12 U.S.C. § 222; 91 Fed. Res. Bull. 312 (2005); *http://www.federalreserve.gov/otherfrb.htm* (displaying map of the twelve Federal Reserve Districts). The New York Fed is located in the Second Federal Reserve District, which consists of New York, Puerto Rico, the United States Virgin Islands, and parts of New Jersey and Connecticut. Rules of Organization § 3(a), III Fed. Res. Reg. Serv. ¶ 8-012; 91 Fed. Res. Bull. 312 (2005).

Unlike companies engaged in private enterprise, Federal Reserve Banks do not seek profits, but are required to transfer their net earnings to the Treasury. *See* 12 U.S.C. § 290. The United States always retains the residual capital interest in the Federal Reserve Banks. *See id.* Congress has on occasion treated the Federal Reserve Banks as the government's own rainy day fund, directing, for example, the payment of over $3.7 billion to the Treasury in 2000. *See* 12 U.S.C. § 289. *See also* Pub. L. No. 103-66, § 3002(b), 107 Stat. 337 (1993) (directing payment of $106 million to Treasury in 1997 and $107 million in 1998).

B. Petitioner

Petitioner is a former employee of the New York Fed. (*See* Appendix to Petition ("App.") at 5a-6a.) Petitioner worked in the New York Fed's cash issuance and processing operation, conducted out of the New York Fed's operations center in East Rutherford, New Jersey, from October 2000 through December 2001, when she went out on paid medical leave for an injury she allegedly sustained at work. (App. at 6a.) Petitioner was terminated on July 31, 2002 after she failed to either return to work or file an application for disability benefits. (*Id.*)

II. PROCEDURAL HISTORY

A. The Complaint

On or about December 19, 2002, Petitioner filed suit in New Jersey Superior Court against the New York Fed and seven New York Fed employees. Petitioner's claims arise solely under two New Jersey employment statutes, namely, the Conscientious Employee Protection Act ("CEPA"), N.J. Stat. Ann. § 34:19-1 *et seq.*, and the New Jersey Law Against Discrimination ("LAD"), N.J. Stat. Ann. § 10:5-1 *et seq.* Petitioner alleged that her "handicaps" under the LAD are neck and back injuries, and diabetes treatable with moderate modifications in diet. (App. at 6a.) On February 14, 2003, Respondents removed the action to the United States District Court for the District of New Jersey pursuant to 12 U.S.C. § 632, the FRA's removal provision, which provides that all suits against Federal Reserve Banks are deemed to "arise under the laws of the United States."

B. The Motion to Dismiss

In June 2003, Respondents moved to dismiss the Complaint. Among other things, Respondents sought dismissal pursuant to Fed. R. Civ. P. 12(b)(1) on federal preemption grounds because the FRA conflicts with and thus preempts the application of the LAD and CEPA to a Federal Reserve Bank. As Respondents explained in their motion, this is so for two reasons. First, Federal Reserve Banks, including the New York Fed, are instrumentalities of the United States performing federal functions and are presumptively immune from state regulation unless Congress has explicitly authorized that regulation. Second, even under traditional preemption analysis, Petitioner's LAD and CEPA claims are preempted by the FRA because the LAD and CEPA conflict with federal law and frustrate Congressional intent to provide Federal Reserve Banks with wide latitude in their employment decisions.

The District Court initially denied Respondents' motion in an order dated March 31, 2004, but later certified its decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). (*See* App. at 31a.)

III. THE THIRD CIRCUIT OPINION

On August 3, 2006, the Third Circuit issued a unanimous opinion reversing the District Court's March 31, 2004 order. The Third Circuit analyzed the LAD and CEPA under the traditional preemption analysis set forth in *English v. General Electric Co.*, 496 U.S. 72 (1990), and recognized that these state statutes far exceeded the substantive, procedural, and remedial provisions of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.*, and the federal

whistleblower protection statute, 12 U.S.C. § 1831j ("Section 1831j"). The Third Circuit held that the expansive scope of the LAD and CEPA "frustrates the Congressional purpose behind § 341(Fifth), as impliedly amended by the ADA and 12 U.S.C. § 1831j," and that the LAD and CEPA were thus preempted by federal law. (App. at 25a n.10.)

Because the Third Circuit found the *English* preemption analysis to be dispositive, the court did not find it necessary "to reach the broader, albeit amply supportable, conclusion that the New York Fed is a federal instrumentality."[1] (App. at 14a.) The Third Circuit noted, however, "that strong arguments have been made in favor of such status," and that, in the case of federal instrumentalities, state law is preempted absent express Congressional authorization to the contrary. (App. at 12a.) The Third Circuit thus suggested independent grounds for finding that the LAD and CEPA are preempted with respect to the New York Fed and its employees based on the instrumentality status of the New York Fed.

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1. The concept that Federal Reserve Banks are instrumentalities of the United States for purposes of preemption analysis is as old as Supremacy Clause analysis itself. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436-37 (1819) (Bank of the United States, the predecessor to the Federal Reserve, was an "instrument" of the U.S. and should be treated like the sovereign for purposes of preemption analysis). *See also U.S. Shipping Bd. Emergency Fleet Corp. v. W. Union Telegraph Co.*, 275 U.S. 415, 425-26 (1928) (recognizing Federal Reserve Banks as federal "instrumentalities").

REASONS FOR DENYING THE PETITION

I. THE THIRD CIRCUIT OPINION IS IN HARMONY WITH THIS COURT'S PREEMPTION JURISPRUDENCE

The Third Circuit Opinion is in harmony with one of this Court's most venerable precedents, *McCulloch v. Maryland*. In *McCulloch*, the Court considered whether a Maryland statute could be applied to the Bank of the United States, the nation's central bank. The Court held that states have no power "to retard, impede, burden, or in any manner control" the operations of the nation's central bank absent express Congressional authorization. *McCulloch*, 17 U.S. (4 Wheat.) at 436.

The Federal Reserve Act created Federal Reserve Banks, the modern-day successor to the Bank of the United States. *See Melcher v. Fed. Open Mkt. Comm.*, 644 F. Supp. 510, 521-22 (D.D.C. 1986), *aff'd*, 836 F.2d 561 (D.C. Cir. 1987) (recounting the history of the nation's central bank). Congress intended the Federal Reserve Banks to play a major role in developing, implementing and fostering the monetary and fiscal policies of the United States. *See* Board of Governors of the Federal Reserve System, *The Federal Reserve System: Purposes & Functions* at 6-11 (9th ed. 2005), *available at http://www.federalreserve.gov/pf/pf.htm*.

Congress intended Section 341 (Fifth) "to allow the federal reserve banks the 'greatest latitude possible' in terminating their employees" in order to maintain the public trust. *Evans v. Fed. Reserve Bank of Phila.*, No. Civ.A.03-4975, 2004 WL 1535772, at *5 (E.D. Pa. July 8, 2004) (citing *Talbott v. Bd. of County Comm'rs of Silver Bow County*, 139 U.S. 438, 443 (1891) (noting Congressional intent to create

national banking system with "uniform operation"); *Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 526 (9th Cir. 1989)).

Petitioner argues that the LAD and CEPA are not preempted because the ADA applies to the New York Fed, and the ADA "itself purports to *preserve* state laws that provide greater protections for disabled employees." (Pet. at 22.) This Court has rejected Petitioner's "double saving clause" argument as "simplistic." *Shaw v. Delta Air Lines*, 463 U.S. 85, 101 n.22 (1983).[2] As the Court recognized, "the double saving clause argument, taken to its logical extreme, would save almost all state laws from pre-emption." *Id.* The Court soundly rejected this approach. *Id.* The Third Circuit Opinion followed suit, noting:

> [i]t would be a mistake . . . to argue that because the *ADA* preempts neither the Federal Reserve Act nor CEPA or LAD, the *Federal Reserve Act* cannot have such preemptive force.

(App. at 25a n.10.)

Petitioner also argues that Congress did not intend Section 341 (Fifth) to preempt state law because "that provision actually says not one word about state law." (Pet. at 24.) Under Petitioner's view, a court would look only

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2. Petitioner tries to distinguish *Shaw* by pointing out that the federal statute in that case included an explicit preemption provision. (*See* Pet. at 25 n.6) This point, however, is irrelevant. Regardless of whether preemption is express or implied, a court must examine Congressional intent. *See English*, 496 U.S. at 78-79 ("Pre-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.") (internal citation omitted).

to whether Congress has expressly preempted a state law, thereby ignoring the well-settled tenets of field and conflict preemption. *See, e.g., English*, 496 U.S. at 79 ("in the *absence of explicit statutory language*, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively" or "to the extent that it actually conflicts with federal law") (emphasis added).

Petitioner claims that the Third Circuit held that the LAD and CEPA were preempted "simply because they provided ***remedies*** or procedures that varied from federal employment laws."[3] (Pet. at 25.) To the contrary, the Third Circuit held that the LAD and CEPA go far beyond their federal analogs with respect to both remedies *and* substantive protections. (*See* App. at 26a-28a.)

Lastly, Petitioner argues that the Third Circuit made a "*radical* departure from this Court's jurisprudence by holding that *any* purported 'conflict' required the state law to be preempted in its entirety" and by refusing to "pare back" the LAD and CEPA to exactly match their federal analogs. (Pet. at 27 (emphasis added).) Again, Petitioner is incorrect.

The Third Circuit exercised proper judicial restraint by refusing to rewrite language enacted by the New Jersey legislature, and thus properly dismissed Petitioner's LAD and CEPA claims. *See United States v. Albertini*, 472 U.S. 675, 680 (1985) ("Statutes should be construed to avoid constitutional questions, but this interpretative canon is not

3. Petitioner relies on cases that considered, in the absence of a federal remedy, the preemption of state causes of action that seek to enforce federal requirements, such as with respect to package labeling. (*See* Pet. at 25-26.) Those cases are inapposite because Petitioner is not seeking to enforce any federal requirement.

a license for the judiciary to rewrite language enacted by the legislature."). *See also Sperry v. Fla. ex rel. Fla. Bar*, 373 U.S. 379, 384 (1963) (state law "must yield when incompatible with federal legislation") (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (internal quotation omitted)).

The Third Circuit Opinion is in perfect harmony with relevant decisions of this Court. Therefore, this Court should deny the Petition. *See* Sup. Ct. R. 10(c).

II. THERE ARE NO CIRCUIT OR STATE COURT CONFLICTS WARRANTING CERTIORARI

Petitioner attempts to portray a deepening divide among the courts that have considered the preemptive effect of the "dismiss at pleasure" provisions of the "federal Bank Acts."[4] (*See* Pet. at 13-19.) Contrary to Petitioner's suggestion, the Third Circuit Opinion represents a growing consensus as to the proper preemption analysis with respect to Section 341 (Fifth).

A. There Is No Inter-Circuit Conflict

Petitioner argues that four Circuits—the Third, Fourth, Sixth, and Ninth Circuits—"have now developed at least three divergent approaches to whether the 'dismiss at pleasure' language preempts state employment laws, leaving

4. Congress included virtually identical "dismiss at pleasure" provisions in the FRA, Section 341 (Fifth); the National Bank Act ("NBA"), 12 U.S.C. § 24 (Fifth) ("Section 24 (Fifth)"); and the Federal Home Loan Bank Act ("FHBLA"), 12 U.S.C. § 1432(a).

the jurisprudence in this area in considerable disarray." (Pet. at 3.) This is incorrect.[5]

Every Court of Appeals that has addressed this issue has uniformly found that the FRA's "dismiss at pleasure" provision (as well as the analogous provisions in the NBA and FHLBA), at a minimum, preempts state employment laws like the LAD and CEPA, which provide greater substantive and procedural rights and remedies than corresponding federal laws.[6] No federal appellate court has concluded that any Federal Reserve Bank anywhere is subject to state employment laws that provide greater substantive or procedural rights or remedies than federal

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5. In fact, earlier this term, the Court denied a petition for certiorari in *Kroske v. US Bank Corp.*, 432 F.3d 976 (9th Cir.), *cert. denied*, 127 S. Ct. 157 (2006), which alleged conflicts between Circuit and state courts—including conflicts with the Third Circuit Opinion—nearly identical to those asserted in the instant Petition.

6. Petitioner argues that the Third Circuit Opinion also conflicts with district court decisions on this issue. This argument is inapposite. *See* Robert L. Stern *et al.*, *Supreme Court Practice* 237 (8th ed. 2002) ("The Supreme Court will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court, whether in the same circuit or in another circuit.").

Nonetheless, nearly every district court that has considered this issue has held that the "dismiss at pleasure" provisions in the FRA, NBA and FHLBA preempt state employment laws like the LAD and CEPA, which provide greater substantive and procedural rights and remedies than corresponding federal laws. (*See* App. at 22a-23a (discussing cases).)

law.[7] Even Petitioner concedes that every Court of Appeals that has addressed the preemptive scope of the "dismiss at pleasure" provisions has agreed, at a minimum, that these provisions preempt state employment law "*to the extent there [are] any significant variations between state and federal law.*" (Pet. at 17 (emphasis added).)

The only difference is the method used to reach the same result. As discussed in more detail below, the Fourth and Sixth Circuits have taken a broader approach to the instant preemption analysis, while the Third and Ninth Circuits have adopted a narrower approach. This difference does not rise to the level of conflict necessary to merit a grant of certiorari. *See* Stern *et al.*, *supra* note 6, at 225 (to justify a grant of certiorari, "there must be a real or 'intolerable' conflict on the same matter of law or fact").

1. *The Broader Approach*

The Fourth and Sixth Circuits have adopted the broader approach that the "dismiss at pleasure" language preempts *all* employment rights created by state law. *See Arrow v. Fed.*

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7. By omitting relevant portions of quotations or taking quotations out of context, Petitioner mischaracterizes Respondents' briefs below to claim that the New York Fed has conceded the existence of a conflict on the instant preemption issue. (*See, e.g.*, Pet. at 8, 10, 13.) Petitioner is wrong. Respondents have always recognized that the Courts of Appeals are in harmony with respect to the "dismiss at pleasure" provisions' preemptive effect on state laws that provide greater substantive and procedural rights and remedies than federal anti-discrimination laws. Respondents argued below that the District Court's decision stood in direct conflict with the holdings of other Circuits and of district courts within the Third Circuit on important Constitutional issues. The Third Circuit Opinion has now resolved this conflict.

Reserve Bank of St. Louis, 358 F.3d 392, 393 (6th Cir. 2004) (affirming dismissal of plaintiff's Kentucky employment law claims against Federal Reserve Bank because Section 341 (Fifth) "applies to preempt state employment rights"); *Andrews v. Fed. Home Loan Bank of Atlanta*, 998 F.2d 214, 220 (4th Cir. 1993) (FHLBA "dismiss at pleasure" provision preempts state employment law claims against Federal Home Loan Banks); *Ana Leon T. v. Fed. Reserve Bank of Chi.*, 823 F.2d 928, 931 (6th Cir. 1987) (FRA "dismiss at pleasure" provision "preempts any state-created employment right" against a Federal Reserve Bank). *See also Sheehan v. Anderson*, 263 F.3d 159 (3d Cir. 2001), *aff'g*, No. 98-5516, 2000 WL 288116, at * 5 (E.D. Pa. Mar. 17, 2000) (summarily affirming district court holding that Section 341 (Fifth) "preempts any state created employment right").

The Third Circuit here declined to take a position with respect to the approach adopted by the Fourth and Sixth Circuits, because it was not necessary to consider "whether state remedies exactly consonant with the ADA and 12 U.S.C. § 1831j would similarly offend 'the full purposes and objectives of Congress'" in order to decide the appeal. (App. at 25a.)

2. *The Narrower Approach*

Here, the Third Circuit followed the preemption analysis employed by the Ninth Circuit in *Kroske v. US Bank Corp.* (*See* App. at 23a (finding Ninth Circuit approach "persuasive").) The Third and Ninth Circuits found that the "dismiss at pleasure" provisions of the FRA, NBA and FHLBA do not preempt state employment laws that are *consistent* with federal anti-discrimination laws, but do preempt any state employment laws that are *inconsistent*—

i.e., that provide more expansive rights and remedies than those available under federal law.

a. *Ninth Circuit Jurisprudence*

The Ninth Circuit articulated this approach in *Kroske*, where it considered whether age discrimination claims against a national bank under the Washington Law Against Discrimination ("WLAD") were preempted by the NBA's "dismiss at pleasure" provision, Section 24 (Fifth). The Ninth Circuit noted that Section 24 (Fifth) conflicted with the later-enacted Age Discrimination in Employment Act ("ADEA"). *Kroske*, 432 F.3d at 987-88. The Ninth Circuit concluded that the "dismiss at pleasure" provision of Section 24 (Fifth) was impliedly amended, "but only to the extent necessary to give effect to the ADEA," and no further. *Id.* at 987.

The Ninth Circuit then considered whether Section 24 (Fifth), as impliedly amended by the ADEA, preempted the WLAD claims in question. The Ninth Circuit recognized that Congress intended "to create a national banking system with uniform and universal operation through the entire territorial limits of the country." *Id.* at 989 (internal citation and quotation omitted). The court acknowledged that state anti-discrimination law that is not consistent and is more expansive than federal anti-discrimination law "may frustrate the congressional purpose of uniform regulation" of banking across the nation. *Id.* The court held that only state employment laws that "substantively mirror[]" federal anti-discrimination law may be applied. *Id.*

The Ninth Circuit concluded that the WLAD claim in question was not preempted by the NBA "dismiss at pleasure" provision because the WLAD provision at issue "mirrors the

substantive provisions of the ADEA and is interpreted consistently with the ADEA." *Id.* at 987. However, the court held that the NBA "dismiss at pleasure" provision did preempt the application of state anti-discrimination law that is more expansive than federal law. *Id.* at 987-89. The court also reaffirmed several of its past decisions that go at least this far.[8] *Id.* at 984-85. *See Walleri v. Fed. Home Loan Bank of Seattle*, 83 F.3d 1575, 1582 (9th Cir. 1996) (FHLBA's "at-pleasure" provision preempted state wrongful discharge claim); *Mackey*, 867 F.2d at 526 (state tort claims against national bank are preempted by Section 24 (Fifth)); *Inglis v. Feinerman*, 701 F.2d 97, 99 (9th Cir. 1983) (FHLBA's "at-pleasure" provision preempted state wrongful discharge claim); *Bollow v. Fed. Reserve Bank of S.F.*, 650 F.2d 1093, 1098 (9th Cir. 1981) (Federal Reserve Bank employee's claims alleging right to pre-termination hearing under state law conflicted with and were preempted by Section 341 (Fifth)).

b. *The Third Circuit Opinion*

Like the Ninth Circuit in *Kroske*, the Third Circuit applied the traditional preemption analysis set forth by this Court in *English*. (*See* App. at 9a, 16a.) The Third Circuit observed that "Congress has clearly expressed the intent to grant the broadest possible power and right to dismiss

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8. Petitioner mistakenly claims that *Kroske* held that the "dismiss at pleasure" language was limited only to contractual claims. (*See* Pet. at 16.) Petitioner, however, ignores the Ninth Circuit's lengthy discussion of how the "dismiss at pleasure" language preempts *both* contract and tort claims, including wrongful discharge claims. *See Kroske*, 432 F.3d at 984-85. Further, the Ninth Circuit explicitly recognized that the "dismiss at pleasure" language could preempt "state law prohibitions against discriminatory termination that are not consistent with federal anti-discrimination laws." *Id.* at 989.

employees" to Federal Reserve Banks, entities that are "undeniably crucial to the federal monetary system." (*Id.* at 25a.) The Third Circuit noted that the ADA and Section 1831j impliedly amended Section 341 (Fifth) by limiting a Federal Reserve Bank's power to dismiss its employees on grounds prohibited by the later-enacted federal anti-discrimination laws, but no further. (*Id.* at 19a-20a.)

The Third Circuit concluded that Section 341 (Fifth), as impliedly amended by the ADA and Section 1831j, "preempts *any* state employment law that goes beyond the remedies and protections provided by those federal laws," because such provisions "conflict with Congress's intent to provide Federal Reserve Banks with the broadest latitude possible in carrying out their statutory duties, while giving due recognition to the applicability of the ADA and 12 U.S.C. § 1831j's requirements" and thus "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Id.* at 24a (internal quotation and citation omitted).)

Both the Third and Ninth Circuits allow the application of state employment laws that mirror federal law, and preempt state employment laws that do not. Contrary to Petitioner's suggestion, the Third and Ninth Circuits are in harmony with respect to their preemption methodology.

3. *Petitioner's Claims Are Preempted Under Either the Broader or the Narrower Approach*

The Third Circuit noted the clear differences between the ADA and Section 1831j, on the one hand, and the LAD and CEPA, on the other. (*See* App. at 26a-29a.) The LAD protects individuals with temporary and insubstantial

impairments, while the ADA only protects individuals with impairments that substantially limit one or more major life activities. *See Failla v. City of Passaic*, 146 F.3d 149, 154 (3d Cir. 1998) (recognizing inconsistent standards between "the [LAD's] definition of 'handicapped,' as compared to the [ADA's] definition of 'disability'"); *Soules v. Mount Holiness Mem'l Park*, 808 A.2d 863, 866 (N.J. Super. Ct. App. Div. 2002) ("LAD's definition of handicap, and its scope, is not comparable to the definitions and scope of handicap or disability under the ADA").[9]

Importantly, the very conditions Plaintiff alleges in her LAD claims—neck and back injuries and diabetes treatable with moderate modifications in diet (App. at 6a)—are not disabilities entitled to protection by the ADA. *See Sutton v. United Air Lines*, 527 U.S. 471, 482 (1999) (disability exists only where an impairment substantially limits a major life activity, not where it might be limiting if mitigating measures were not taken); *Marinelli v. City of Erie, Pa.*, 216 F.3d 354, 362-63 (3d Cir. 2000) (neck and arm pain that rendered

9. The definition of "handicap" or "disability" under the LAD may encompass conditions expressly excluded from the ADA's definition of "disability," such as gender identity disorders, paraphilia, and drug addiction. *Compare* 42 U.S.C. §§ 12114(a), 12208 & 12211(b) (transsexualism, exhibitionism, pedophilia, voyeurism, transvestitism and drug addiction excluded from ADA's definition of disability) *with Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 374-77 (N.J. Super. Ct. App. Div. 2001) (transsexualism can qualify as handicap under LAD because unlike the ADA, the LAD "is very broad" and does not require condition to "restrict any major life activities to any degree") *and A.B.C. v. XYZ Corp.*, 660 A.2d 1199, 1200 (N.J. Super. Ct. App. Div. 1995) ("handicap" under LAD may include mental illness of a psychosexual variety, like exhibitionism) *and In re Cahill*, 585 A.2d 977, 978-79 (N.J. Super. Ct. App. Div. 1991) (LAD recognizes morphine abuse as a handicap).

plaintiff unable to lift objects greater than ten pounds, operate snow plow or do household chores did not render plaintiff "disabled" under ADA because impairment did not substantially limit a major life activity); *Failla*, 146 F.3d at 152 (plaintiff's back condition determined at trial to be handicap under the LAD, but *not* disability under the ADA); *Schaefer v. State Ins. Fund*, 207 F.3d 139, 142-43 (2d Cir. 2000) (non-insulin dependent diabetes, when medicated, did not meet definition of disability under ADA absent substantial limitation of major life function).

CEPA is also broader in scope than the federal whistleblower protection statute. Section 1831j only protects against retaliation for disclosing circumscribed types of suspected wrongdoing to a circumscribed list of entities. CEPA, in contrast, "permits an employee to complain to *any* public body about virtually any topic, even those within the employee's own control." (App. at 28a (internal citation omitted).) *See also Hernandez v. Montville Twp. Bd. of Educ.*, 808 A.2d 128, 132 (N.J. Super. Ct. App. Div. 2002), *aff'd*, 843 A.2d 1091 (N.J. 2004) (school custodian's complaints that it took a week for clogged toilet to be repaired and single light bulb to be changed were cognizable under CEPA, even though these repairs lay within custodian's own area of responsibility). In fact, CEPA has been described as the "most far reaching whistleblower statute in the nation." *Blackburn v. United Parcel Serv.*, 3 F. Supp. 2d 504, 517 (D.N.J. 1998), *aff'd*, 179 F.3d 81 (3d Cir. 1999) (internal quotations and citation omitted).

Moreover, the LAD and CEPA allow for individual liability, while the ADA and Section 1831j do not. (App. at 26a-28a.) *Compare Failla*, 146 F.3d at 158 (adopting the Restatement (Second) of Torts standard for aiding and

abetting liability under the LAD) *and Palladino ex rel. United States v. VNA of S. N.J., Inc.*, 68 F. Supp. 2d 455, 474 (D.N.J. 1999) (holding that CEPA provides for individual liability) *with Koslow v. Commonwealth of Pa.*, 302 F.3d. 161, 178 (3d Cir. 2002) (no individual liability available under the ADA) *and Rouse v. Farmers State Bank of Jewell, Iowa*, 866 F. Supp. 1191, 1203-04 (N.D. Iowa 1994) (no private right of action against individuals under federal whistleblower protection statute).

The LAD further expands the remedies available under the ADA in the area of compensatory and punitive damages. (*See* App. at 27a.) The ADA caps these damages. *Gagliardo v. Connaught Labs., Inc.*, 311 F.3d 565, 570 (3d Cir. 2002). In contrast, there is no such limit under the LAD. *See Baker v. Nat'l State Bank*, 801 A.2d 1158, 1169 (N.J. Super. Ct. App. Div. 2002).

The LAD and CEPA impose rights and remedies far greater than the applicable federal laws. Therefore, under either the broader or the narrower approaches adopted by the Circuits, Petitioner's LAD and CEPA claims are preempted by federal law.

B. There Is No Conflict with a State Court of Last Resort

Petitioner argues that two state courts of last resort take a different position than the Third Circuit Opinion with respect to the preemptive effect of Section 341 (Fifth).[10]

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10. Petitioner also argues that one lower state court opinion—*White v. Federal Reserve Bank*, 660 N.E.2d 493 (Ohio Ct. App. 1995)—conflicts with the Third Circuit Opinion. (*See* Pet. at 17-18.) A putative conflict with a lone lower state court opinion, however, is not a recognized basis for granting certiorari. *See* Sup. Ct. R. 10.

(*See* Pet. at 17-18.) These claimed differences do not provide the compelling reasons necessary to grant certiorari.

First, the two cases Petitioner relies on did not even involve Section 341 (Fifth) or Federal Reserve Banks.[11] There is unlikely ever to be a conflict between federal and state courts on the interpretation of Section 341 (Fifth). Congress expressly granted federal courts original jurisdiction in any case in which a Federal Reserve Bank is a party, and gave Federal Reserve Banks the right to remove any case to federal court, regardless of whether the case involves a federal question or diversity of citizenship. *See* 12 U.S.C. § 632. Therefore, issues pertaining to Federal Reserve Banks generally have been decided by federal courts.

Second, Petitioner concedes that the "lead opinion" in *Peatros v. Bank of America*, 990 P.2d 539 (Cal. 2000), "appears to mirror the Ninth Circuit's holding in *Kroske*" (Pet. at 18), which, as discussed above, is consistent with the Third Circuit Opinion.

In sum, Petitioner has pointed to no conflict with a Court of Appeals or a state court of last resort that would warrant a grant of certiorari. *See* Sup. Ct. R. 10(a).

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11. Indeed, *Sargent v. Central National Bank & Trust Co.*, 809 P.2d 1298 (Okla. 1991), did not even concern state anti-discrimination laws.

CONCLUSION

Petitioner has not met her burden of establishing a compelling reason for this Court to grant the Petition. Therefore, for the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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No. 06-634

IN THE

Supreme Court of the United States

MAUREEN FASANO,

Petitioner,

—v.—

FEDERAL RESERVE BANK OF NEW YORK, RON HENRY, CYNTHIA RAMOS, LEROY HOPE, DOTTIE BOYD, KIM RUSSO, LISA YOUNG and MERTHA JAKUBISZEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO OPPOSITION BRIEF

I. THIS CASE SQUARELY PRESENTS THE IMPORTANT QUESTION OF WHETHER THE "DISMISS AT PLEASURE" LANGUAGE IN THE FEDERAL BANK ACTS PREEMPTS STATE EMPLOYMENT LAW

Respondents' Opposition Brief is significant for what it does ***not*** say: respondents do not deny that the Petition presents an important federal question. In the courts below, in fact, respondents sought interlocutory review under 28 U.S.C. § 1292(b), precisely because the case "raises Constitutional issues that will have far-ranging implications and consequences for the entire Federal Reserve System." Brief in Support of Defendants' Motion for Interlocutory Appeal, at 1 (May 21, 2004). The Third Circuit obviously agreed, not only taking the interlocutory appeal, but also publishing its "PRECEDENTIAL" opinion. 1a.

Respondents' express hope is that this ruling "may have an impact on other cases nationwide asserting state law employment discrimination claims against Federal Reserve Banks . . . ." Brief in Support of Defendants' Motion for Interlocutory Appeal, at 14 (May 21, 2004). For this very reason, respondents made a point of involving as Amici Curiae the other eleven Federal Reserve Banks. 8a. One may expect that the Third Circuit's "precedential" opinion will be cited in courts around the nation on motions seeking to dismiss employees' claims asserted under state law.

The employees affected by the decision below, therefore, will number in the thousands. Within the Federal Reserve System alone, there are an estimated 19,069 Federal Reserve Bank employees as of 2006, the last year for which figures are available. See http://www.federalreserve.gov/generalinfo/foia/frbbankbudgets/2006ReserveBankBudgets

.pdf (Table 2). These employees will be impacted by the decision below, regardless of whether they ever assert any employment law claim, because they will be treated differently depending on whether the Bank employer believes they are covered by state law. This could affect their lives in areas as diverse as hiring, on the job harassment, accommodations for disabilities, retaliation or termination. A federal question that potentially affects thousands of employees nationwide warrants the appropriate exercise of this Court's certiorari jurisdiction. See, e.g., Patterson v. Lamb, 329 U.S. 539 (1947) (granting review where the status of thousands of draftees could be affected by the decision below).

And, of course, the decision below will not be limited to Federal Reserve Bank employees. As respondents concede, "virtually identical 'dismiss at pleasure' provisions" are found in the Federal Reserve Act, 12 U.S.C. § 341 (Fifth); the National Bank Act, 12 U.S.C. § 24 (Fifth); and the Federal Home Loan Bank Act, 12 U.S.C. § 1432(a). See Opp. Br., at 11 n.4. As the Third Circuit noted, every federal circuit to interpret the "dismiss at pleasure" language in the Bank Acts has done so consistently for all three statutes. 16a. Therefore, the "nationwide" impact of the decision below will not only affect Federal Reserve Bank employees, but also the officers and/or employees of the Federal Home Loan Banks and the National Banks.

Likewise, respondents do not dispute that the decision below implicates not only the New Jersey laws at issue below, but also the "historic police powers" of all fifty States to prohibit discrimination. DeCanas v. Bica, 424 U.S. 351, 356 (1976). As respondents' concede, the key to the Third Circuit's holding is that any state law that does not "exactly match" federal employment law, is preempted ***in its entirety.*** 11a-12a; 22a; 28a-29a. As we pointed out in our Petition, all fifty states have various laws prohibiting

employment discrimination and retaliation, many of which vary in significant ways from federal law. Petition, at 20-22. The Third Circuit's ruling not only potentially preempts all of these laws for Bank employees, but also would drastically interfere with the "collaborative anti-discrimination scheme" contemplated by federal law. Kroske v. US Bank Corp., 432 F.3d 976, 988-89 (9th Cir. 2005), as amended 2006 U.S. App. LEXIS 3367 (Feb. 13, 2006), cert. denied, 127 S. Ct. 157 (2006); 42 U.S.C. § 12117(a); 42 U.S.C. § 2000e-5(c) and (d). Indeed, respondents' goal is to divest all state agencies of any jurisdiction over claims against them. See 12a. A ruling that potentially preempts such a wide area of state law presents an important federal question for this Court's review. See, e.g., Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 385 (2000) (granting certiorari to review a decision invalidating a state statute restricting political contributions, "[g]iven the large number of States that limit [such] contributions").

Finally, this is a "clean case" that presents an excellent vehicle for determining whether the "dismiss at pleasure" language preempts state employment laws. There are no complicated factual disputes, because respondents' motion to dismiss was made on the pleadings, so the relevant facts for the appeal are based on the complaint, 5a, and are largely immaterial in any event to the pure question of law at issue. The preemption issue was squarely raised and decided in the trial court and in the Third Circuit, and there are no jurisdictional or other obstacles that would prevent this Court from reaching the question presented. Even respondents' faint attempt to defend the Third Circuit's ruling on alternate grounds, in reality, merely seeks a broader ruling, which would preempt all state laws regardless of any variation from federal law. See Opp. Br., at 6-7. Respondents' argument in the alternative does not avoid the conflict among the Circuits, but presents it squarely, by urging the Sixth Circuit's holding that preempts

all state laws regardless of any conflicts. See Arrow v. Federal Reserve Bank of St. Louis, 358 F.3d 392, 393 (6th Cir. 2004). See infra at 5.[1]

This Court has repeatedly granted certiorari to review whether a federal statutory scheme preempts a state employment law claim. See, e.g., English v. General Electric Co., 496 U.S. 72, 78 (1990); California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987). This case is unusual only in that both parties agree the case presents an important question of federal law. Brief in Support of Defendants' Motion for Interlocutory Appeal, at 1 (May 21, 2004) (the case "raises Constitutional issues that will have far-ranging implications and consequences for the entire Federal Reserve System"). This Court should grant certiorari to resolve this important federal question.

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[1] With regard to the merits of this alternate argument, there is no authority to support respondents' contention that the Federal Reserve Banks are analogous to government agencies, and therefore presumptively immune from all state laws. This Court has always held that the Banks are "not departments of the government. They are private corporations in which the government has an interest." United States Shipping Board v. Western Union, 275 U.S. 415, 425-26 (1928). Thus, both the EEOC, and the Federal Reserve Board itself, take the position that the Federal Reserve Banks should be treated as private corporations for purposes of federal anti-discrimination laws. Enforcement Guidance on Coverage of Federal Reserve Banks, at *6, EEOC Decision No. N0915-002 (Oct. 20, 1993) (1993 WL 452695) ("the Federal Reserve Banks are private sector employers and . . . charges and complaints filed pursuant to the ADEA, Title VII and the EPA should be processed under the private sector provisions of those Acts"); 50 Fed. Reg. 18769 (May 2, 1985) (the "Federal Reserve Banks are not government agencies for purposes of the Civil Rights Act"). As for respondents' reliance on McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), and its progeny, that case addressed whether a State could directly tax a bank owned by the United States. There is, in fact, a statute that expressly exempts the Banks from state and local taxation. 12 U.S.C. § 531. There is no statute that exempts the Banks from state employment laws.

II. THERE IS A LONG STANDING, CURRENTLY ACTIVE CONFLICT AMONG THE CIRCUITS, AND AMONG THE STATE COURTS, OVER WHETHER THE "DISMISS AT PLEASURE" LANGUAGE PREEMPTS STATE LAW

Respondents insist, however, that certiorari should be denied because there are supposedly "no circuit or state court conflicts" over the preemptive effect of the "dismiss at pleasure" language. Opp. Br., at 11. Respondents are wrong; indeed, their own statements contradict this claim.

First, there is no dispute that the Third Circuit's decision conflicts with the holding of the Sixth Circuit on this issue. The Sixth Circuit has held, since 1983, that all state employment laws are completely preempted by the "dismiss at pleasure" language found in the Bank Acts. Ana Leon T. v. Federal Reserve Bank of Chicago, 823 F.2d 928, 929-30 (6th Cir. 1987); Wiskotoni v. Michigan Nat'l Bank-West, 716 F.2d 378, 387 (6th Cir. 1983). Although the Sixth Circuit staked out this position two decades ago, it has reaffirmed its holding as recently as 2004. Arrow v. Federal Reserve Bank of St. Louis, 358 F.3d 392, 393 (6th Cir. 2004).

The Third Circuit refused to follow the holdings in Ana Leon T. and Arrow. 20a-23a. Unlike the Sixth Circuit, the Third Circuit postulated that there would be circumstances where it would not preempt state employment laws against the Banks. 11a-12a. Unless respondents contend that the Third Circuit was being disingenuous, there is no dispute that the Third and Sixth Circuits are in conflict.

The Third Circuit's ruling is also in conflict with the Ninth Circuit's holding in Kroske v. US Bank Corp., 432 F.3d 976, 988-89 (9th Cir. 2005). Respondents insist every Circuit Court has reached the "same result," and has held that the "dismiss at pleasure" language preempts state employment

claims. Opp. Br., at 1, 12, 13. This assertion is manifestly wrong in view of the "result" of Kroske, which held that Washington's Law Against Discrimination, Wash. Rev. Code §§ 49.60.010-400 was ***not preempted*** by what respondents describe as the "virtually identical 'dismiss at pleasure' provision[]," Opp. Br. at 11 n.4, found in the National Bank Act, 12 U.S.C. § 24 (Fifth). Kroske, 432 F.3d at 987.

"A genuine conflict . . . arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts." Robert L. Stern, et al., Supreme Court Practice 226 (8th ed. 2002). Here, the Third and Ninth Circuits have interpreted "virtually identical" language in two cases, reaching opposite results. The Third Circuit has held that the *NJ*LAD is preempted ***in its entirety***. The Ninth Circuit has held that the *W*LAD is not preempted at all. This is a genuine conflict warranting review. Gutierrez v. Ada, 528 U.S. 250, 254 (2000) (certiorari granted "to review a split between the Ninth Circuit's interpretation of the Organic Act of Guam and the Third Circuit's reading of identical language in the Revised Organic Act of the Virgin Islands").

The conflict here is twofold. First, the Third Circuit held that the state law is preempted whenever is does not "exactly match" federal employment law. 11a-12a; 22a; 28a. By contrast, the Ninth Circuit held that there is no preemption, as long as the state law is "parallel" to federal law, and prohibits the same employment practice. Kroske, 432 F.3d at 988-89. As we pointed out in the Petition (and respondents do not challenge this point), the Ninth Circuit thus upheld the WLAD, even though its requirements and remedies go beyond federal law. See Petition, at 15-16. By contrast, these same variations in state and federal law (e.g., more exp[illegible]sive damages, no need to exhaust administrative remedies, broader statutory reach), were held to be fatal to the state law in the Third Circuit's analysis. See 26a-27a.

Second, the Ninth Circuit emphasized that if there were any genuine conflicts between state and federal law, any preemption would be limited to the actual conflict. Kroske, 432 F.3d at 987-88, 989. By contrast, the Third Circuit held the opposite: any failure to "exactly match" federal law meant the state law was preempted in its entirety. 28a-29a.

Respondents insist the conflicts in these holdings are immaterial, because either approach invariably leads to the "same result." Opp. Br., at 13. Patently that is not true. The state anti-discrimination law was ***not*** preempted in Kroske; the state law ***was*** preempted by the Court below.

A three-way Circuit split would seem sufficient to grant certiorari on a question that admittedly will have "far-ranging implications and consequences for the entire Federal Reserve System." But the situation is even more compelling, because the Third Circuit's decision is also in conflict with the highest courts of two States, which have both upheld state employment claims against preemption challenges based on the "dismiss at pleasure" language. Sargent v. Central National Bank & Trust Co., 809 P.2d 1298, 1303 (Okla. 1991); Peatros v. Bank of America, 990 P.2d 539, 552 & n.6 (Cal. 2000). Respondents dismiss these conflicts, because these cases involved the National Bank Act, not the Federal Reserve Act. That is a curious position, given that respondents admit the "dismiss at pleasure" language in the two statutes is "virtually identical," and given that every court -- including the Court below -- has interpreted the two statutes consistently.[2]

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[2] Respondents complain that we cited to the chaos in the lower courts on whether the "dismiss at pleasure" language preempts state law, arguing that district court conflicts are immaterial. However, as we explained in the Petition, the lower court conflicts "obviously add to the confusion, thus making it proper for counsel to bring such lower court decisions to the Court's attention." Supreme Court Practice, supra, at 238. See, e.g., Heffron v. Int'l Soc'y for Krishna Consc., 452 U.S. 640, 646 n.9 (1981).

The substantial conflicts over the preemptive effect of the "dismiss at pleasure" language have been recognized by courts and commentators alike. Kahn & McCarthy, At-Will Employment in the Banking Industry: Ripe for a Change, 17 Hofstra Lab. & Emp. L. J. 195, 211-12 (1999) ("there is a split among the federal circuits and the state courts concerning whether state employment laws are preempted by the Bank Acts"); Kroske, 432 F.3d at 985 ("[w]e disagree with the Sixth Circuit's summary conclusion that state anti-discrimination statutes . . . are preempted by the banking laws"); Peatros, 990 P.2d at 559 (Brown, J., dissent) ("state and federal courts have variously concluded the 'at pleasure' dismissal provision . . . fully preempts wrongful termination causes of action under state antidiscrimination statutes, partially preempts such claims, or has no preemptive impact whatsoever"). The Court below recognized the existence of the conflict. See, e.g., 7a ("wide split in authority among courts around the country"). Indeed, until now, ***respondents*** agreed "[t]here is a split among the Circuits . . . over the preemptive scope of these 'dismiss at pleasure' provisions." Brief for Appellants, at 33 (Jan. 20, 2006).

These inter-Circuit and Circuit/State conflicts are long standing, active and current. These conflicts began in the 1980s, persisted through the 1990s, and continue unabated to the present day. The most recent conflicts, between the Third and Ninth Circuits, are based not on dicta, but rather on the central holdings for each case, and stem in each instance from a lengthy, published opinion focused on the question presented, which is fully explored in exhausting detail. And this conflict has lead to completely different results on very similar facts. Only this Court can resolve this recurrent conflict over the preemptive effect of the "dismiss at pleasure" language.

III. THE THIRD CIRCUIT'S HOLDING, THAT ANY STATE LAW THAT DOES NOT "EXACTLY MATCH" FEDERAL EMPLOYMENT LAW IS PREEMPTED IN ITS ENTIRETY, IS IN CONFLICT WITH THE DECISIONS OF THIS COURT

Respondents' effort to reconcile the Third Circuit's decision with this Court's preemption jurisprudence is unavailing. Indeed, it is striking that respondents largely ignore several of this Court's key holdings.

First, the Third Circuit erred in holding that a state law prohibiting discrimination is preempted if it "goes beyond the remedies and protections provided by . . . federal laws." 24a. By contrast, this Court has held "'that' ordinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law.'" English v. General Electric, 496 U.S. at 89. Respondents urge that these cases are inapposite because "[p]etitioner is not seeking to enforce any federal requirement." Opp. Br., at 10 & n.3. Quite the contrary, the federal statute barring disability discrimination expressly incorporates state laws, including their "remedies, rights, and procedures," even if they "provide[] greater or equal protection" than federal law. 42 U.S.C. § 12201(b).[3]

Second, the Third Circuit improperly held that any purported "conflict" between state and federal law required the state law to be preempted in its entirety. 28a. This Court, by contrast, has consistently held that "state law is displaced only 'to the extent that it actually conflicts with federal

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[3] Respondents treat the ADA's anti-preemption provision as a dead letter, even though this case does not involve any express preemption of state law, insisting that "whether preemption is express or implied, a court must examine Congressional intent." Opp. Br., at 9 n.2. That's true, but here Congress' manifest intent is that state laws are not preempted even if they provide greater protections than federal law.

law.'" Dalton v. Little Rock Family Planning Services, 516 U.S. 474, 476 (1996). In a non-sequitur, respondents argue that federal courts should not "rewrite" state law. As this Court knows, it is not a question of "rewriting" state law, but rather limiting any preemption of state law to the actual conflict. English, 496 U.S. at 88.

Last, the Third Circuit violated this Court's instruction which "enjoins seeking out conflicts between state and federal regulation where none clearly exists." English, 496 U.S. at 89. There is no compelling reason to read the "dismiss at pleasure" language as interfering with the States' historic police power to prohibit discrimination. No conflict warranting any preemption exists, if the language is read to codify the employment at will doctrine, leaving the State's power to regulate unlawful discrimination fully intact. To this, respondents have no answer whatsoever.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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